No. 05-1039

In The
Supreme Court of the United States

DOES 1 and 2,

Petitioners,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party In Interest.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California
Second Appellate District, Division Three

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court may compel production of private papers by enforcing a subpoena duces tecum issued without express statutory authority by a grand jury.

2. Whether a state court may compel production of private papers by enforcing criminal and grand jury subpoenas duces tecum without any showing of legal cause to warrant such production.

3. Whether these state grand jury subpoenas duces tecum are so vague and overbroad that they constitute general warrants.

4. Whether a state grand jury subpoena *duces tecum* to compel production of private papers relating to the religious relationship between a priest and his Church impermissibly chills the First Amendment religious rights of the parties.

5. Whether subpoenas duces tecum to compel production of employment files of priests and thereby infringe on Free Exercise of Religion rights protected by the First Amendment and legitimate expectations of privacy protected by the Fourth Amendment must be strictly scrutinized.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California is *Roman Catholic Archbishop of Los Angeles and Does 1 and 2 v. Superior Court*, 131 Cal. App.4th 417 (2005), *review denied*, Cal. LEXIS 13083 (Nov. 16, 2005). Appendix 1-63.

The underlying opinion of the Los Angeles County Superior Court has been filed under seal. Sealed Appendix ("SA") Ex. 3 at 63-122.[1]

The order of the Supreme Court of California denying discretionary review is attached. Appendix 65.

JURISDICTION

The Superior Court's order was filed on September 7, 2004. Petitioners filed a petition for writ of mandate on January 28, 2005. The Court of Appeal's opinion was filed on July 25, 2005. The Supreme Court's order was filed on November 16, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2005) (state-court judgments may be reviewed by writ of certiorari where any "right, privilege, or immunity is . . . claimed under the Constitution.").

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[1] The opinion is filed under seal because it includes an appendix that the Superior Court sealed and ordered not to be disclosed to the public because it discloses grand jury proceedings. SA Ex. 3 at 97:1-5, 98-121. The opinion and four other sealed documents have been filed under seal in the concurrent Petition for a Writ of Certiorari filed by the Roman Catholic Archbishop of Los Angeles, which are incorporated in this Petition by reference. With this Petition, Petitioners have also filed four additional exhibits under seal for the same reasons, and numbered them consecutively to the sealed exhibits already filed in connection with the Archbishop's Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides in its entirety:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (United States Constitution, Amendment IV.)

The Religion Clauses of the First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . " (United States Constitution, Amendment I.)

STATEMENT OF THE CASE

This Petition arises from the well-known investigation of allegations of sexual child abuse by Roman Catholic priests in Southern California. Although it involves only two grand jury subpoenas duces tecum, Petitioners expect that the outcome will control the procedures used in many future grand jury investigations.

This case raises important questions concerning the scope and application of the Fourth Amendment to compelled production of private papers pursuant to criminal and grand jury subpoenas duces tecum, in particular whether a court may enforce such subpoenas without a statute expressly authorizing them, and without any showing of legal cause to warrant such compelled production.

The case also raises important questions concerning the scope and application of the Religion Clauses of the First Amendment, particularly when they intersect with the Fourth Amendment when a grand jury attempts to compel production of private papers maintained by a

church concerning the confidential, pastoral, and episcopal counseling between a priest and his bishop. The Roman Catholic Archbishop of Los Angeles, a corporation sole ["Archdiocese," sometimes hereinafter] has already filed a Petition for Writ of Certiorari concerning this case, raising issues concerning the Religion Clauses of the First Amendment, and Petitioners join in the arguments made by the Archdiocese.

The effort by California grand juries to compel production of private Church files began in June, 2002, when a Los Angeles grand jury served three subpoenas duces tecum on the Archdiocese concerning the personnel records of three priests. Those priests, also represented by Petitioners' counsel herein, filed motions to quash the subpoenas on numerous grounds, including that there was no California statute generally authorizing a grand jury to issue subpoenas duces tecum, and even if the grand jury had such power, the subpoenas were invalid because they failed to include any affidavit of good cause and materiality, as required by California statute and case law for other judicial subpoenas duces tecum. The priests in that case also alleged that the subpoenas amounted to overbroad "fishing expeditions" into sensitive Church files. Those motions resulted in a published opinion on the subject denying the motions on Constitutional grounds, but all of the grand jury subpoenas duces tecum were quashed later in the proceedings, on June 25, 2004, on the grounds that they sought to investigate allegations of crimes for which prosecution was barred pursuant to the decision in *Stogner v. California*, 539 U.S. 607 (2003).[2] The appellate decision regarding the facial validity of those subpoenas is *M.B. v. Superior Court,* 103 Cal. App.4th 1382 (2002). It is included in the Appendix to this Petition, at Appendix 66-83, pursuant to Supreme Court Rule

[2] The total number of subpoenas duces tecum issued by the Los Angeles grand jury that had to be dismissed because of the *Stogner* decision had grown to 31.

14(1)(i), which permits inclusion of "any other relevant opinions . . . necessary to ascertain the grounds of the judgment, of those in companion cases . . . ", as well as "any other material the petitioner believes essential to understand the petition."[3]

Within days after the original grand jury subpoenas were quashed, the District Attorney convened a new grand jury, and on June 30, 2004, had it issue the two subpoenas duces tecum that are at issue here. SA Ex. 5 at 255-258. They were served on the Archdiocese, commanding production of Petitioners' private and confidential files with the Church. The subpoenas included all of the sweeping description of the quashed subpoenas from the earlier grand jury, but added a reference to seeking records not barred by the statute of limitations, as well as older records to "corroborate" any new allegations.

Petitioners Doe 1 and Doe 2,[4] both incardinated as priests by the Archdiocese, promptly filed a motion to quash the new subpoenas duces tecum, before the files were scheduled to be produced to the grand jury. SA Ex. 6 at 259-319. In that motion, as well as subsequent appellate proceedings, Petitioners asserted that the subpoenas violated the Fourth Amendment (SA Ex. 6 at 262-263, 266, 269-272, 279-280, 289-292) and the First Amendment (SA Ex. 6 at 264, 300-302), in addition to other grounds.

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[3] The *M.B.* decision does not constitute the law of the case herein, because the instant subpoenas were issued by a different grand jury for the records of a different selection of priests, but the appellate court panel was the same, and it decided Petitioners' major issues in this underlying case merely by citation to its decision in *M.B.* For convenience, Petitioners deemed it helpful to include that decision in its entirety in the Appendix.

[4] Petitioners are designated as Does because the litigation concerns secret grand jury proceedings, in which the identities of targets, witnesses, and other details are mandated to be kept secret unless and until an indictment is returned.

The records subpoenaed by the grand jury are contents of private personnel files maintained by the Archdiocese on Petitioners, who served the Archdiocese as priests for decades. As a consequence of the uniquely deep involvement of the Church in the lives of its priests-employees, which involves a lifelong mutual commitment between Church and priests, and the ongoing process of the Church in assisting and developing the priests to live as worthy representatives of Christ on Earth, there is no aspect of a priest's life that may not be the subject of confidential discussion between a p iest and the hierarchy of the Church. SA Ex. 2 at 30:19-26, SA Ex. 3 at 80:6-10. In the cases at hand, each Petitioner had personal problems that impaired his abilities properly to carry out his religious responsibilities, and the matters were the subject of conversations and programs of rehabilitation under the aegis of the Church. As a result, the private records in the Archdiocese's custody include privileged records of psychiatric and medical treatment, notes of the Archbishop relating to discussions, meetings and plans for the reformation of Petitioners' lives so that they might continue with their careers, and related papers of the most intimate natures. All of the documents are private and relate to the struggle of Petitioners with private problems, and the confidential efforts of the Archdiocese to meet its obligation to the priests and the members of the Church.

The Archdiocese also moved to quash the subpoenas, asserting extensive First Amendment grounds as well as attorney-client privilege as to some particular documents. SA Ex. 2. Petitioners joined in the Archdiocese's motions, as permitted by California law.

The trial court denied the motion to quash the subpoenas outright on the Constitutional grounds asserted, but conducted extensive *in camera* review of documents to which claims of privilege attached. The court did quash the subpoenas as to many documents because of statutory privileges; the affected documents were primarily psychiatric reports that were within the private files, and a few

documents covered by the attorney-client privilege and California's clergy privilege. It ordered production of many other sensitive private documents, including summaries of psychiatric reports that were ordered not to be disclosed. SA Ex. 3 at 64-122.

Both the Archdiocese (SA Ex. 4; 123-254) and Petitioners (SA Ex. 6, 320-427) sought appellate review by petitions for writs of mandate. Except for one document that the Court of Appeal ordered not to be produced, those petitions were denied. Appendix 1-64. After Petitioners sought rehearing, the Court of Appeal modified its decision, and that decision is the one which is subject to this Petition for Writ of Certiorari.

Petitioners and the Archdiocese sought review by the California Supreme Court, but that was denied on November 16, 2005. Appendix 65.

The Archdiocese filed a Petition for Writ of Certiorari to this Honorable Court, including a Sealed Appendix of five documents that have been under seal in all stages of the state proceedings. Petitioners incorporate those exhibits of the Sealed Appendix by reference, and Petitioners added four exhibits to the Sealed Appendix.

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. The grand jury subpoenas were issued without express statutory authority, and thus are unreasonable under the Fourth Amendment.

The California grand jury is a creature of statute, and it is an arm of the Superior Court. California Penal Code § 888.[5]

[5] All later references in this Petition to Code sections will refer to California codes, unless the code of a different jurisdiction is expressly indicated in the citation.

California Penal Code § 939.2 endows the criminal grand jury[6] its sole general power to subpoena witnesses, and it reads in its entirety:

> "A subpoena requiring the attendance of a witness before the grand jury may be signed and issued by the district attorney, his investigator or, upon request of the grand jury, by any judge of the superior court, for witnesses in the state, in support for the prosecution, for those witnesses whose testimony, in his opinion is material in an investigation before the grand jury, and for such other witnesses as the grand jury, upon an investigation pending before them, may direct."

California Government Code § 7476 authorizes a criminal grand jury to ask a court to issue a subpoena for records from financial institutions "upon a written showing to a judge of the superior court that there exists a reasonable inference that a crime within the jurisdiction of the grand jury has been committed and that the financial records sought are reasonably necessary to the jury's investigation of that crime." That section does not apply to the records subpoenaed by the grand jury in this case, but it demonstrates that the California Legislature is aware of the means to authorize a grand jury to subpoena private papers.

Where the Legislature includes certain powers in a statute, but omits others, it is presumed that the Legislature intended to omit such other powers. "Inclusio unius, exclusio alterius." Without a specific grant of power from the Legislature, the grand jury cannot compel production of documents. California Penal Code § 939.2 *excludes* that power.

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[6] California statute also establishes "watchdog" grand juries to inquire into performance of public officials and other civil matters, but they cannot indict for crimes, and are not involved in this matter. Different laws pertain to the civil grand juries regarding obtaining public documents.

By its terms, Section 939.2 applies to investigations by the grand jury, and omits any means to require a witness to bring records with him.

In *M.B. v. Superior Court, supra*, the precursor case relied on in the appellate decision at issue here (Appendix at 62), the court held that there was an inherent, "common law" power for a California grand jury to subpoena documents, without citing specific authority to that effect. Appendix 69-73. Petitioners contend that the Fourth Amendment, and controlling cases construing it, irrefutably demonstrates that there can be no such inherent power to compel production of private papers, on pain of jail for contempt.

American Constitutional history makes it clear that the government is limited to those powers given expressly to it. Indeed, the British practice of searching without legal cause, using "writs of assistance" issued by a prosecutor instead of warrants issued by a judge, were a principal grievance that led quickly to the American Revolution. As a consequence, our Founding Fathers carefully and definitely limited the power of the government to search for private papers, with the enactment of the Fourth Amendment. It establishes the right to be free in our "persons, house, papers and effects" from *warrantless* searches. From its beginning, American democracy has emphatically provided that the government may not compel production of private records except as provided by a valid statute that comports with the Fourth Amendment.

"Surely an accused's constitutional right to privacy in his papers and records is not diminished because law enforcement officials seek to obtain them by subpoena rather than by warrant." *Carlson v. Superior Court*, 58 Cal. App.3d 13, 129 Cal. Rptr. 650 (1976).

The power to issue a subpoena duces tecum is equivalent to the power to search under a warrant: it invades a person's most private matters on *threat of jail*.

That such an invasive power may not be inferred, but must be expressly granted by the Legislature, is clear from

a review of the landmark case of *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). In that case, the Supreme Court ruled that a federal law compelling production of import invoices in customs forfeiture cases on the order of a prosecutor, without judicial review beforehand, was unconstitutional as a violation of the Fourth Amendment. The Supreme Court carefully reviewed the history of the Fourth Amendment, going back to famous English cases striking down the "writs of assistance" and that led directly to the adoption of the Fourth Amendment to prevent similar abuses in America's future. In particular, it extensively quoted and adopted the reasoning and holdings of *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765).

The justices in the *Boyd* decision noted that *Entick v. Carrington* became one of the landmarks of English and American liberty, and was entirely well known to the authors of the Constitution. It recounted the *Entick* decision in detail, to explain the importance of the Fourth Amendment in controlling and limiting governmental invasions into private papers.

In *Entick*, following his usual practice, the British Secretary of State issued "writs of assistance" to search for private papers that might be evidence of libel or criticism of the government, and his agents searched Entick's home and seized his papers. Entick sued for trespass, and recovered a sum that was eye-popping in its day. The opinion rendered by Lord Camden in that case became an important cornerstone of American legal principles, and they endure to this day. Most important for this Petition, the holding of *Entick v. Carrington, supra,* was endorsed and quoted extensively by the United States Supreme Court in *Boyd v. United States, supra.*

According to Boyd, Lord Camden said that the power to seize a man's private papers is so enormous that "the law to warrant it should be clear in proportion as the power is exorbitant. *If it is the law, it will be found in our*

books; if it is not to be found there, it is not the law." [Emphasis added, quoted in *Boyd, supra,* at 627.]

"The great end for which men entered into society was to secure their property. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass . . . If no such excuse [for the trespass] can be found or produced, *the silence of the books is an authority*, against the defendant, and the plaintiff must have judgment."

"Papers are the owner's goods and chattels; they are his dearest property . . . *Where is the written law that gives any magistrate such a power*? I can safely answer, there is none; and, therefore, it is too much for us, without such an authority, to pronounce a practice legal which would be subversive of all the comforts of society." [Emphasis added.]

The power to invade a man's papers in England or America is too terrible to be implied, and it has never been. The California Legislature has not given the power to the grand jury to issue subpoenas duces tecum to compel production of the records at issue, and the court has no authority to grant that terrible power.

Lord Camden wrote his magnificent defense of the security of private property from unfettered power in 1765, and the United States Supreme Court in *Boyd* noted that it must have been known to every American Founding Father who wrote, debated, and authorized the Fourth Amendment when it was adopted a few years later. "The struggles against arbitrary power in which they had been engaged for more than twenty years, would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred." [*Boyd, supra,* at 630.]

There is no doubt in American Constitutional and legal history that the power to seize private papers can never be left to implication or invented as something conveniently "inherent."

Indeed, when the *Boyd* Supreme Court concluded its exhaustive review of the historical, legislative, and statutory review of the governmental power to compel production of private papers, it held that such procedures were the same in principle as warrantless invasions of the home.

> "[W]e are further of opinion that a compulsory production of the private books and papers of the owners of the goods sought to be forfeited in such a suit . . . is the equivalent of a search and seizure – and an unreasonable search and seizure – within the meaning of the Fourth Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *It is the duty of the courts to be watchful of the constitutional rights of the citizen, and against any stealthy encroachments thereon.*" [At 635, emphasis added.]

The power to compel production of private papers, on the pain of jailing, is far too great to exist in this free republic by implication. As Lord Camden said, "If it is the law, it will be found in our books; if it is not to be found there, it is not the law."

The powers of the grand jury come from the Legislature, and California has no law giving the grand jury the power to subpoena the files in question. If the founding

principles of American liberty are to continue to have substance today, a Writ of Certiorari should issue in this case because the state court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(b).

B. A judicially-created scheme to compel production of private papers by enforcing criminal and grand jury subpoenas duces tecum without any showing of legal cause to warrant such production is unreasonable under the Fourth Amendment.

The judgment at issue applied the earlier decision in *M.B. v. Superior Court*, 103 Cal. App.4th 1384 (2002), to decide that the California statute authorizing subpoenas duces tecum in criminal *trials* could be adopted for grand jury investigations. Appendix 73-76. The criminal trial subpoena statutes had always been required to comply with other statutes requiring that they be accompanied by sworn affidavits demonstrating good cause and materiality. However, to achieve the goal of protecting the principle of grand jury secrecy, the judgment at issue here followed *M.B.*'s holding that no showing of cause of any kind is necessary for criminal trial subpoenas duces tecum, and by extrapolation, neither is one required for grand jury subpoenas duces tecum. Appendix 62.

In so doing, it departed from a long line of uniform precedent that construed the various statutes to require affidavits of good cause and materiality for all judicial subpoenas in California. Those statutes constituted the means by which the California legislature determined to authorize subpoenas to compel production of private papers in conformity with the requirements of the Fourth Amendment. The maverick decisions of *Does 1 and 2 v. Superior Court*, the judgment concerned in this Petition, and its precursor, *M.B. v. Superior Court, supra*, substituted judicial fiats that violate the Fourth Amendment for a system adopted by the legislature that incorporated

Fourth Amendment protections for all subpoenas that it authorized.

It is necessary to describe California's established procedures in order to understand the magnitude of the departure from them.

The subpoenas duces tecum at issue in this case were served without any affidavits setting forth good cause to produce the papers described and their materiality.

Code of Civil Procedure § 1985(b) provides that, "A copy of an affidavit shall be served with a subpoena duces tecum issued before trial, showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control."

Code of Civil Procedure § 1987.5 provides in pertinent part, "The service of a subpoena duces tecum is invalid unless at the time of such service a copy of the affidavit upon which the subpoena is based is served on the person served with the subpoena." "Affidavits may not be supplemented after service of a subpoena. *Pacific Auto Ins. Co. v. Superior Court*, 258 Cal. App.2d 829 (1968)."

As Petitioners have shown above, California Penal Code § 939.2 authorizes a grand jury to issue a subpoena *ad testificandum*.

California Penal Code § 1326 provides for subpoenas to require witnesses to appear in proceedings "before a court or magistrate," for trials and other cases, after a complaint, indictment, or information exists.[7]

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[7] California statutes permit felonies to be initiated by grand jury indictment, or by a complaint issued by a district attorney, and after a preliminary hearing, by an information. Misdemeanors are initiated only by complaint.

California Penal Code § 1327 prescribes the form of a subpoena authorized by § 1326, and adds that it may direct the witness to bring with him "books, papers, or documents." It does not refer to grand jury subpoenas pursuant to § 939.2 at all.

California Penal Code § 1102 states, in its entirety, "The rules of evidence in civil actions are applicable also in criminal actions, except as otherwise provided in this Code." Code of Civil Procedure §§ 1985(b) and 1987.5 appear in the section of the Code headed, "Means of Production – Evidence."

The California codes constitute a single statute, and the placement of various provisions within different titles is not determinative of whether a particular provision relates to a particular transaction. *Peace v. Alcohol Beverage Control,* 51 Cal.2d 310 (1958); *Lewis v. Dunne,* 134 Cal. 291 (1901).

Until the decision in *M.B. v. Superior Court, supra,* California cases uniformly held that an affidavit was a necessary component of a valid subpoena duces tecum in criminal matters.

Cases requiring affidavits include:

California Supreme Court decisions: *People v. Blair,* 25 Cal.3d 640 (1979); *People v. Jenkins,* 22 Cal.4th 900 (2000); *Pitchess v. Superior Court,* 11 Cal.3d 571 (1974); *State ex rel. Department of Transportation v. Superior Court [Hall],* 37 Cal.3d 847 (1985).

California Court of Appeal decisions: *People v. Brinson,* 191 Cal. App.2d 253 (1961); 12 Cal. Rptr. 625; *People v. Bigelow,* 200 Cal. App.3d 59 (2000); *CBS, Inc. v. Superior Court,* 85 Cal. App.3d 241 (1978); *Hammarley v. Superior Court,* 89 Cal. App.3d 388 (1979); *People v. York,* 108 Cal. App.3d 779 (1980); *People v. Superior Court [Broderick],* 231 Cal. App.3d 584 (1991); *Department of Corrections v. Superior Court [Ayala],* 199 Cal. App.3d 1087 (1988); *Millaud v. Superior Court,* 182 Cal. App.3d 471 (1986); *People v. Superior Court [Barrett],* 80 Cal.

App.4th 1305 (2000); *People v. Superior Court,* 107 Cal. App.4th 488 (2003); *People v. Schmitt,* 155 Cal. App.2d 87 (1957); *People v. Clinesmith,* 175 Cal. App.2d Supp. 911 (1959); *Pacific Lighting Leasing Co. v. Superior Court,* 60 Cal. App.3d 552 (1976); *Alhambra v. Superior Court,* 205 Cal. App.3d 1118 (1988).

In *Pitchess v. Superior Court, supra,* a criminal defendant sought to compel production of records of complaints against police officers, supported by an affidavit that asserted that the records were necessary for his defense. The decision mainly revolved around the conflict between the Fourth Amendment requirement to justify compelled production of private records and a criminal defendant's Fifth Amendment right not to incriminate himself in the process of providing such justification. The California Supreme Court held that strict civil discovery rules of proving "good cause and materiality" did not apply to criminal cases, and that a criminal defendant could satisfy the demonstration of cause requirement with a less explicit affidavit. It expressly held that the affidavits in that case were sufficient.

While not all of the cases listed above requiring affidavits of cause explicitly discuss the Fourth Amendment reason for such a showing, some do. One of the most extensive discussions on the subject is found in *Pacific Lighting Leasing Co. v. Superior Court, supra.* It involved a motion brought by a third party from whom a criminal defendant sought to compel production of records for his defense. The opinion reviewed many of the major precedents on the subject, in deciding the conflict between a criminal defendant's Fifth Amendment rights and his Due Process rights to have evidence produced for his defense on the one hand, and the Fourth Amendment right of a third party, civilian witness to be free of unreasonable search and seizure of his private papers pursuant to a criminal subpoena duces tecum issued under California Penal Code § 1326 and § 1327, on the other hand.

The court in *Pacific Leasing, supra,* acknowledged the Fourth Amendment necessity for a showing of legal cause

under California Penal Code § 1326 and § 1327 was key to the validity of a criminal subpoena duces tecum throughout the opinion.

> "The liberal standard stated in *Pitchess* entitling a defendant in a criminal case to discovery on the basis of 'general allegations' which establish some cause for discovery other than 'a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime' poses no problem in a case such as *Pitchess* and the cases cited therein. In each of these cases the party from whom the records were sought had no standing to assert rights against unreasonable search and seizure with respect to such records. Sheriff Pitchess as custodian of the public records certainly had no such rights and none were asserted by him. He relied, instead, upon '[t]he privilege attaching to official information. . . .' In all the other cited cases, the records were sought from the prosecution. The statement in *Pitchess*, therefore, that the requirements for a showing of good cause imposed by Code of Civil Procedure sections 1985 and 2036 did not apply cannot be construed as a holding that a witness, such as petitioner, who does have the right to be free from unreasonable search and seizure, can be deprived of such rights by a defendant's 'general allegations' of his need to ascertain facts which will assist him in preparing his defense." [Citations omitted.]
>
> . . .
>
> "The expansion of criminal discovery to include the production of documents by witnesses who are protected against unreasonable search or seizure thus requires adequate provision for protection of those rights. *The standard set forth in Pitchess – general allegations which establish some cause for discovery other than 'a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime' suffices*

> *to entitle a criminal defendant to discovery and the production of documents from persons having no constitutional rights to protect; but it does not appear to be an adequate substitute for a showing of good cause when such constitutional rights are asserted. Some showing that the search of petitioner's records is not an unreasonable seizure is required."*
>
> *"The protection of petitioner's right to be free from unreasonable search and seizure constitutes a 'legitimate governmental interest.'"* [Emphasis added.]

A grand jury subpoena duces tecum is a search and seizure within the meaning of the Fourth Amendment to the United States Constitution. *Hale v. Henkel,* 201 U.S. 43 (1906).

The Fourth Amendment applies when a grand jury seeks to obtain papers by the compulsory process of a subpoena duces tecum. *Brown v. United States,* 276 U.S. 134 (1928).

In applying the statutory provisions of F.R.Cr.P. 17(c) to a grand jury subpoena in *United States v. R. Enterprises,* 498 U.S. 292 (1991), the Supreme Court determined that a lesser showing of relevance may be required to justify such a subpoena than for a trial subpoena, because of the investigatory nature of a grand jury. In that case, however, there was no real question that the recipient of the subpoena was aware of the relevance of the materials sought, since it was one of three affiliated corporations that were the target of the investigation into interstate pornography, and the subpoena was not challenged on the grounds that it was vague or that compliance would be unreasonable. In this case, the recipient of the subpoena is a third party, the sweep of the subpoena has been challenged from the beginning as being unreasonably vague and overbroad, and because it severely burdens the Free Exercise of Religion of both the Archdiocese-witness and the Petitioners-targets.

In any event, the holding of *R. Enterprises, supra,* was not that a grand jury subpoena need never be justified by a factual showing of cause, but that, under the facts of that case, a general showing of relevance to the subject of a legitimate grand jury investigation was sufficient, and was provided. It was decided under a federal statute authorizing the subpoena, and providing a procedure to determine its reasonableness, as required by the Fourth Amendment.

The subpoenas in this case were issued pursuant to California statute. The legislature included the requirement of affidavits of good cause and materiality for all subpoena duces tecum authorized by the comprehensive procedures it enacted. Without the affidavit requirement, the subpoena procedures would violate the Fourth Amendment. Petitioners contend that the legislature has not authorized grand jury subpoenas duces tecum at all, because it omitted them from § 939.2, but if it is determined that a grand jury can subpoena documents by using the trial subpoena provisions of §§ 1326/1327, then Petitioners additionally contend that those subpoenas must also comply with the statutory affidavit requirements in order to pass Fourth Amendment muster. The California legislature has not made any provision for a subpoena duces tecum without them.

But the judgment at issue sidestepped those provisions and established cases. In addition to adopting the holding of *M.B.* that grand juries have an inherent "common law" power to compel production of private papers by means of a subpoena duces tecum, the underlying decision also adopted the *M.B.* court's conclusion that other statutes empowered enforcement of subpoenas duces tecum without any showing of legal cause in all criminal matters, whether at the investigatory grand jury stage or the accusatory stage in court.

To reach that conclusion, the court adopted a convoluted path that ignored or misinterpreted existing case and statutory law that applied to subpoenas duces tecum

in criminal trials, preliminary hearings, and other adversarial settings.

In the face of that solid line of cases, all requiring compliance with the Fourth Amendment by applying the affidavit requirement established by the Legislature, the *M.B. v. Superior Court* decision, applied *in toto* in the judgment at issue, was creative.

Acknowledging that California Penal Code § 939.2 does not authorize a grand jury to issue the subpoenas duces tecum, the court decided that it could use the provisions for trial subpoenas established in California Penal Code § 1326.[8]

In so doing, the decision significantly misread the holding of *Pitchess v. Superior Court, supra*. Although that decision stated that civil discovery statutory procedures, which include depositions, requests for admissions, and other devices, do not apply in criminal cases, it also *expressly* held that the affidavits submitted in support of a criminal defendant's effort to compel production of police discipline records were adequate. The *M.B.* court elected to

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[8] Prior to 1959, grand jury investigations were included in § 1326, but in that year, the Legislature created California Penal Code § 939.2, and deleted provisions for grand jury investigations from § 1326. The *M.B.* court relied on a cryptic comment in the legislation that, "It is not the intent of the Legislature to make any *substantive changes* in the laws affected by this act," to arrive at the conclusion that § 939.2 was intended to remain part of the trial subpoena *procedures* of § 1326 and § 1327. The court also claimed to find support in a 1938 decision, *Samish v. Superior Court*, 28 Cal. App.2d 685, which held that a grand jury could subpoena income tax records; however, the *Samish* case did not litigate the authority of a grand jury to issue subpoenas duces tecum, but rather whether income tax records were subject to subpoena (a holding that led to legislative action to prohibit such subpoenas in most cases), and it occurred decades before the 1959 changes and sheds no light on them. It also relied on its own decision in *Fabricant v. Superior Court*, 104 Cal. App.3d 905 (1980), which was not cited by any party in the litigation, and which concerned whether a party who successfully quashed a criminal subpoena could utilize civil procedures to recover attorney fees for his trouble, and had nothing at all to do with the procedure or authority to compel production of private papers.

ignore entirely *Pitchess's* holding that the affidavits were sufficient, and instead quoted only the dicta that civil discovery procedures do not apply to criminal cases. Appendix 79. In so doing, it next leapt far, deciding that no factual showing of cause to any degree is necessary in support of subpoenas duces tecum in criminal cases or grand jury investigations. It held, "We conclude, however, that the affidavit requirement does not apply to either criminal trials or criminal grand jury proceedings." Appendix 79. *M.B. v. Superior Court, supra,* at 1394. The decision never mentioned how its rule could stand up to the requirements of the Fourth Amendment.

The Fourth Amendment provides that any power to issue subpoenas duces tecum must be authorized by express statute, and not left to implication. *Boyd v. United States, supra.* The only California statutes that authorize subpoenas duces tecum in criminal cases also require that such subpoenas are invalid if they are not served with affidavits demonstrating good cause and materiality. The appellate court violated the Fourth Amendment when it gutted the statutory scheme by deleting the affidavit requirement to enforce the subpoenas at issue.

Petitioners do not debate that the legislature hypothetically could have enacted statutes permitting a lesser showing of cause than that required by the affidavits of good cause and materiality. However, it did not adopt a lesser standard. The Court of Appeal is not free to ignore the Fourth Amendment and certiorari should be granted because the decision on that important federal question conflicts with relevant decisions of this Court.

C. The description of papers to be seized is so sweeping and vague that it constitutes a "fishing expedition" in violation of the Fourth Amendment.

> YOU ARE COMMANDED to appear before the Grand Jury . . . and bring with you . . . [a]ll documents and other materials that are in the

> possession, custody, or control of the Archdiocese of Los Angeles that relate in any way to allegations of child molestation or sexual abuse committed by [the named priest]. (SA Ex. 5, 255-258.)

So reads the essence of each of the subpoenas herein, which are identical except for the name of the priest whose records are targeted. That command is then followed by more than a full page of omnibus listing of categories of documents to which it applies, without identifying a single *specific* document. The actual subpoenas at issue are included both as Exhibit 5 and as Exhibit 9 in the Sealed Appendix.

California and federal courts have long and consistently held that subpoenas duces tecum cannot be used to conduct "fishing expeditions," as Petitioners submit the People are attempting to do with these subpoenas. *Ballard v. Superior Court,* 64 Cal.2d 159 (1966); *Los Angeles Transit Lines v. Superior Court,* 119 Cal. App.2d 465 (1953). In *Samish v. Superior Court,* 28 Cal. App.2d 685 (1938), the court said, "Grand juries should not engage in a 'fishing expedition' or indiscriminate meddling with public or private affairs . . . "

United States v. R. Enterprises, Inc., 498 U.S. 292 (1991), decried grand jury subpoenas that were not built upon adequate factual bases. Said the Supreme Court, "Grand juries are not authorized to engage in arbitrary fishing expeditions."

Hale v. Henkel, 201 U.S. 43 (1906) found that the Fourth Amendment provides protection against a grand jury subpoena duces tecum too sweeping in its terms "to be regarded as reasonable."

In *Texas v. Stanford,* 379 U.S. 476 (1965), a search warrant commanding seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas" was rejected in emphatic terms. "For we think it is clear that this warrant was of a

kind which it was the purpose of the Fourth Amendment to forbid-a general warrant." (At 480.)

The search warrant standards of California Penal Code § 1525 regarding describing "with particularity" the property subject to seizure apply to a subpoena duces tecum. *People v. Mayen,* 188 Cal. 237, 205 P. 435 (1922).

"If the moving party cannot reasonably specify the information contained or believed to be contained in the documents sought but merely hopes that something useful will turn up, *this is a sure sign that the subpoena is being misused." United States v. Noriega,* 764 F. Supp. 1480 (1980).

The scope and specificity of a subpoena may be even more important than that for a search warrant, because a civilian attempting to comply with a subpoena lacks the experience of a peace officer to understand what documents fall within the commanded descriptions and which do not. The vagueness and breadth of a subpoena should not place the custodian of records in the position of having to favor an overly expansive view of compliance or risk jail. *In re Corrado Bros., Inc,* 367 F. Supp. 1126 (D.C. Del. 1973); *In re Grand Jury Subpoena: Subpoena Duces Tecum,* 829 F.2d 1291 (4th CCA 1987).

The subpoenas at issue are *identical* in a material respect to a search warrant that was deemed unconstitutionally overbroad, and unenforceable, in the recent Ninth Circuit decision, *United States v. Bridges,* 344 F.3d 1010 (2003). The Court found that there was probable cause to search a business for evidence of mail fraud, but that the warrant was fatally overbroad in describing the property to be seized because it commanded seizure of records "including, but not limited to" those specified in the warrant.

Said the *Bridges* court, "The wording of this warrant is unquestionably broad in terms of describing what items the federal agents are being asked to seize. In its section entitled 'Items to be Seized,' the warrant authorizes the seizure of all records relating to clients or victims '*including but not limited to*' the ones listed on the warrant. *If, however, the scope of the warrant is 'not limited to' the specific*

records listed on the warrant, it is unclear what is its precise scope or what exactly it is that the agents are expected to be looking for during the search." [Emphasis added.]

That is precisely the fatal defect in the instant subpoenas, which command, "The subpoenaed documents and other materials *include, but are not limited to*," followed by another laundry list of vague categories of items that may or may not exist.

Just as in *Bridges,* the "catch-all" phrase "including, but not limited to" the enumerated items destroys the specificity of the subpoenas, and grants an infinite scope of items for the custodian of records to produce. The proof of the overbreadth is actually in the hands of the Respondent Court, to whom the Archdiocese delivered the subpoenaed records for *in camera* review. Unsure what the description "including, but not limited to," meant, and unwilling to guess at its meaning where the penalty for guessing wrong is a jail sentence for contempt, the Archdiocese delivered essentially Petitioners' entire personnel and confidential personnel files to Respondent Court. Few documents appear to relate to sexual activity of any kind; most relate to employment assignments, vacations, seminars, insurance and financial records, and many other similarly innocuous matters.

These subpoenas are not limited to crimes within the jurisdiction of the grand jury, because they are unlimited in scope of time and place. A grand jury may only inquire into crimes for which it may indict, and a California grand jury has no jurisdiction to inquire into offenses for which the statute of limitations has expired. *People v. Beatty,* 14 Cal. 566 (1860).

In *Samish v. Superior Court,* 28 Cal. App.2d 685, 83 P.2d 305 (1938), the Court of Appeal said, "Of course, investigations of grand juries should be conducted in good faith with reasonable cause to believe that they possess jurisdiction to inquire into the asserted offenses." Citing *Hale v. Henkel,* 201 U.S. 43 (1906).

The subpoenas in this case are the grandest sort of fishing nets. Without limit as to time or place, without identifying any actual document known or believed to exist, they recite a laundry list of categories of documents that might exist, and for practical purposes compel production of entire personnel files, lest the custodian be jailed for overlooking something that might have interest to the People. Such subpoenas are not contemplated by Code of Civil Procedure § 1985, by which the Legislature requires that the items to be produced be described with some particularity.

It is unreasonable under the Fourth Amendment to let the grand jury haul in all manner of unspecified documents with the enormous fishing nets that these subpoenas create. Certiorari should be granted because the state court decision on an important federal question conflicts with relevant decisions of this Court.

D. Subpoenas for private papers concerning the most intimate religious relationship between a priest and his Church impair the Free Exercise of Religion and invade uniquely private zones protected by the Fourth Amendment.

Petitioners contend that these shotgun subpoenas should have been quashed because they impermissibly chill their First Amendment rights to practice their religion freely. As described earlier, Roman Catholic priests owe a lifelong allegiance to the bishop that incardinated them, and are expected to confide in him completely on matters, including intimate personal problems, that affect their ability to represent Christ; when they have problems, the bishop is obligated to help them overcome those problems. That relationship is essential to the practice of their Catholic faith.

Petitioners do not contend that criminal conduct is somehow protected as part of a religious practice. Rather, they assert the Constitutional principle that exercise of

legitimate governmental powers may be prohibited when they have the effect of chilling or discouraging exercise of religious rights. In this case, the religious rights involve the close spiritual relationship between a Roman Catholic priest and the bishop who incardinated him. It embodies duties to be open with the bishop about the intimate problems a priest suffers in his life, and to obey the bishop's instructions to return to a righteous life. Those religious obligations carry to the grave.

There is abundant authority that even the threat of issuing a subpoena violates the Constitution if it silences or deters a person of ordinary firmness from future activities protected by the First Amendment. *White v. Lee,* 227 F.3d 1214 (9th CCA 2000). That case condemned the threat of issuing a subpoena to obtain membership lists of activist homeowners. That court held that when a subpoena encroaches on protected First Amendment activity – freedom of religion is such an activity – it must be the least intrusive means available. The "catch all" subpoenas at issue here are far from being "least intrusive."

The Supreme Court held that a compelling state need was insufficient to justify the chilling effect on First Amendment rights in *National Association for the Advancement of Colored People v. Alabama ex rel. Patterson,* 357 U.S. 449 (1957). The Supreme Court held that before documents related to protected First Amendment activities could be subpoenaed, they must be justified by proof of a "controlling need." Since these subpoenas utterly lacked affidavits, there has been no factual showing of any need under any established process of California law.

In *Presbyterian Church v. United States,* 870 F.2d 518 (9th CCA 1989), a court held that investigation by the Immigration and Naturalization Service of a so-called "sanctuary church," nevertheless could be enjoined where it had the effect of discouraging church members from participating in the practice of their faith, even though the investigation was legal in and of itself. Clearly, in this case, vague subpoenas aimed at essentially all of a priest's

records, both personnel and confidential, has such an effect, and that result is demonstrated by evidence submitted by the Archbishop showing that priests have ceased discussing personal problems with the Cardinal and Vicar for Clergy. SA Ex. 2 at 30:26-31:4.

Such profound impairment of religious freedom violates the First Amendment where it is achieved by the broadest of invasive subpoenas with no factual demonstration of a specific compelling need and that no less intrusive means is available.[9]

The Supreme Court, in *Zurcher v. Stanford Daily,* 436 U.S. 547 (1978), considered the case of a search warrant executed on the offices of a university newspaper, seeking information to identify alleged criminals mentioned on its pages. The paper asserted that, where a search of a newspaper protected by the First Amendment must occur, the court should require it to be conducted by subpoena instead of warrant. The Court rejected that argument, and upheld the validity of the search. However, it noted that the court has the duty and authority to supervise implementation of its process "with particular exactitude when First Amendment interests would be endangered by the search." It also noted that, whether property is seized by a warrant or compelled to be produced by a subpoena, "it does not make a constitutional difference." Where protected Constitutional rights are invaded, the court must supervise to make sure the process occurs with "particular exactitude," and that cannot occur with the kind of overbroad, unjustified subpoenas that are at issue in this case.

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[9] Indeed, since 1997, California Penal Code § 11166 has required clergy to report child abuse, including sexual abuse, to law enforcement officials whenever he "knows or reasonably suspects" it has occurred. There has never been a contention in this litigation that the Archdiocese has not complied with that law. Petitioners contend that it may be viewed as the "least intrusive means," rendering unreasonable further governmental intrusion into confidential Church files, without a very compelling showing of need.

Seizure of evidence that is reasonable in one context may be unreasonable in another where Constitutional rights are affected. An ordinary search within the scope of a valid arrest was found to be unreasonable where it resulted in seizure of a film protected by the First Amendment in *Roaden v. Kentucky,* 413 U.S. 496 (1973).

The subpoenas in this case effectively placed a sheriff's badge on the Cardinal of the Archdiocese. It tells priests in Petitioners' place that when they practice their religion by confiding in their bishop, they might as well be talking to the police. That is an unreasonable result that the Fourth Amendment forbids. Certiorari should be granted because the decision of the state court on an important federal question conflicts with relevant decisions of this Court, and an important question of federal law exists that has not been, but should be, definitively settled by this Court.

E. Government action should be subjected to strict scrutiny when it infringes on religious freedom protected by the First Amendment and privacy rights protected by the Fourth Amendment.

The extent to which the Free Exercise of Religion protections of the First Amendment may prohibit governmental activity has been the subject of litigation in many contexts, particularly since the decision in *Employment Division v. Smith,* 494 U.S. 872 (1990) established that particular conduct may be regulated or prohibited by "religion-neutral" laws, even if they criminalize conduct claimed to be required by a religious faith. In that case, the State of Oregon denied unemployment benefits to people who had been fired for using peyote from jobs at a drug rehabilitation center. They claimed that their peyote use was required by their Native American religion, but the Supreme Court held that the First Amendment prohibited the courts from determining the centrality of peyote use to their religion, and where the law was religiously neutral, it need not meet a test of compelling governmental need.

In the same opinion, the Supreme Court observed, "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections," followed by several examples. (At 881.)

Petitioners assert that the facts of this case differ in two important respects from the rule established in *Smith.*

First, nobody has contended in this case that child molestation is protected by any Constitutional right. The impairment of Petitioners' Free Exercise of Religion rights arises from the unreasonable manner that the grand jury is attempting to gather evidence of an alleged crime, by intruding directly into the religious relationship between the priests and their bishop, effectively making it impossible for communication to flow between them. This case does not present a matter of unjustified reliance on a jailhouse informant, but confidential discussions between the bishop and priests, without which the spiritual relationship is impossible to maintain.

Second, this case also affects privacy rights protected by the Constitution. They have been recognized in several contexts.

One of the most eloquent statements about privacy is found in the dissent of Justice Douglas in *United States v. White,* 401 U.S. 745, at 762 (1971).

> "Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse – a First Amendment value – may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is surveillance. Free discourse liberates the spirit, though it may produce only froth. The individual must keep some facts concerning his thoughts within a small zone of people. At the same time he must be free to pour out his woes or inspirations or dreams to others.

> He remains the sole judge as to what must be said and what must remain unspoken. *This is the essence of the idea of privacy implicit in the First and Fifth Amendments as well as in the Fourth.*"

This Court has established that "a legitimate expectation of privacy" is the core right protected by the Fourth Amendment's prohibition against unreasonable searches and seizures, including unreasonable subpoenas duces tecum. *Katz v. United States,* 389 U.S. 347 (1967). An expectation of privacy is legitimate if it is "one that society is prepared to recognize as 'reasonable.'" *Rakas v. Illinois,* 439 U.S. 128, at 143-144 (1978). Accord, *Minnesota v. Olson,* 495 U.S. 91 (1990).

California has long established that employees have a legitimate expectation of privacy in their workplace, and standing to protect papers, personnel files, and conversations from intrusions. In *Sanders v. American Broadcasting Companies, Inc.,* 20 Cal. 4th 907 (1999) the California Supreme Court noted that greater expectations of privacy are recognized for workplace communications that are "strictly internal," such as those between an employee and employer.

In *El Dorado Savings & Loan Association v. Superior Court,* 190 Cal. App.3d 342 (1987), a party in an employment discrimination suit sought production of the employee file of the only male employee at the entity. The court found that such files are protected by California's Constitutional Right of Privacy (Article I, Section 1 of the California Constitution), and that the employee has a legitimate expectation that they well remain private, and standing to assert that right.

In this case, the vague and overbroad nature of the subpoenas conflicts with Petitioners' Fourth Amendment rights, and so does the intrusion into private files and internal communications within the workplace.

When those protected rights are combined with the very direct impact they have on Free Exercise of Religion rights, strict scrutiny is required, even under *Employment Division v. Smith, supra.* Certiorari should be granted because the decision presents this important question of federal law that has not been, but should be decided by this Court.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 14, 2006

APPENDICES

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PUBLIC APPENDIX

SEALED APPENDIX

Note: Exhibits 1 Through 5, Inclusive, Are Incorporated By Reference To Sealed Exhibits Previously Filed With Petition For A Writ Of Certiorari By The Roman Catholic Archbishop Of Los Angeles Relating To The Same Published Opinion Of The California Court Of Appeal.

APPENDICES – Continued

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Note: The Following Exhibits 6 Through 9, Inclusive, Are Filed By Petitioners As Additions To The Sealed Exhibits Previously Filed By The Roman Catholic Archbishop Of Los Angeles.

131 Cal.App.4th 417, 32 Cal.Rptr.3d 209

Court of Appeal, Second District, Division 3, California.

The ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES, Petitioner,

v.

SUPERIOR COURT of Los Angeles County, Respondent; The People, Real Party in Interest.

Does 1 and 2, Petitioners,

v.

Superior Court of Los Angeles County, Respondent; The People, Real Party in Interest.

Nos. B177852, B180696.

July 25, 2005.

As Modified on Denial of Rehearing Aug. 16, 2005.

Review Denied Nov. 16, 2005.

Hennigan, Bennett & Dorman, J. Michael Hennigan, Donald F. Woods, Jr., and Jeffrey S. Koenig, Los Angeles, for Petitioner The Roman Catholic Archbishop of Los Angeles.

Law Offices of Guzin & Steier and Donald H. Steier, Los Angeles, for Petitioners Doe 1 and Doe 2.

O'Melveny & Myers and Charles C. Lifland, Los Angeles, for Monsignor Thomas J. Green as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Steve Cooley, District Attorney (Los Angeles), and Lael Rubin, William Hodgman, Brentford J. Ferreira and Patrick D. Moran, Deputy District Attorneys, for Real Party in Interest.

KLEIN, P.J.

INTRODUCTION

This proceeding arises out of a grand jury investigation into allegations that two Roman Catholic priests, petitioners Doe 1 and Doe 2 (sometimes hereafter referred to as the Priests), sexually assaulted children while they worked for petitioner Roman Catholic Archbishop of Los Angeles, a Corporation Sole (hereafter referred to as the Archdiocese). In seeking to quash grand jury subpoenas duces tecum, petitioners raise issues that require a balance of the rights of religious belief and practice with the rules of the criminal justice system.

As the California Supreme Court noted in connection with this state's evidentiary privilege for clergy-penitent communications (Evid.Code, §§ 1030-1034), "the statutory privilege must be recognized as basically an explicit accommodation by the secular state to strongly held religious tenets of a large segment of its citizenry." (*In re Lifschutz* (1970) 2 Cal.3d 415, 428, 85 Cal.Rptr. 829, 467 P.2d 557.) While it is true the right to religious freedom holds a special place in our history and culture, there also must be an accommodation by religious believers and institutions to the rules of civil society, particularly when the state's compelling interest in protecting children is in question. Although the religion clauses of the First Amendment to the United States Constitution "embrace[] two concepts, – freedom to believe and freedom to act," the first concept "is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 303-304, 60 S.Ct. 900, 84 L.Ed. 1213, fn. omitted.)

The Los Angeles County Grand Jury subpoenaed various documents from the Archdiocese which purportedly would allow the grand jury to determine whether to indict the Priests. Petitioners objected to disclosure of the subpoenaed documents, primarily relying on the freedom of religion clauses in the federal and California Constitutions and on California's evidentiary privileges. Some of petitioners' objections were sustained, but the great majority of them were overruled. Petitioners seek to reverse the adverse rulings. With the exception of a single document, we affirm the rulings ordering the subpoenaed materials to be turned over to the grand jury.

PROCEDURAL BACKGROUND

In June and July 2002, the Los Angeles County Grand Jury served subpoenas duces tecum on the Archdiocese's custodian of records, seeking documents relating to child sexual abuse allegedly committed by certain Roman Catholic priests. Except for routine attorney-client communications, the Archdiocese turned over the requested documents. However, several priests and the Archdiocese immediately filed motions to quash the subpoenas. As a result, none of the documents has been turned over to the grand jury.

The parties to this proceeding, the petitioners, the Priests and the Archdiocese, and the real party in interest, the District Attorney of Los Angeles County, stipulated to the appointment of Retired Judge Thomas Nuss as referee (hereinafter, referee) to resolve substantive issues raised by the motions to quash.

On July 15, 2002, the referee concluded the subpoenas were not defective for failing to meet the affidavit requirements set forth in Code of Civil Procedure sections

1985, subdivision (b) (affidavit shall be served with subpoena duces tecum showing good cause and materiality) and 1987.5 (service of subpoena duces tecum is invalid without affidavit).

On July 29, 2002, petitioners sought a writ of mandate from this court vacating the referee's order denying their motions to quash. We issued an order to show cause. After briefing and oral argument, we held a California grand jury has the power to issue a subpoena duces tecum and that such a subpoena does not require a good cause affidavit. (*M.B. v. Superior Court* (2002) 103 Cal.App.4th 1384, 127 Cal.Rptr.2d 454.)[1]

On June 25, 2004, the referee quashed all the grand jury subpoenas in response to the United States Supreme Court's decision in *Stogner v. California* (2003) 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544, which held California's newly enacted statute of limitations for child molestation was unconstitutional when used to *revive* time-barred prosecutions. However, the referee granted the People leave to serve new subpoenas requesting the identical documents on the assurance and subsequent showing the People were investigating credible, prosecutable claims against named targets.

On June 30, 2004, the People served the two grand jury subpoenas, one for Doe 1 and one for Doe 2, at issue in this writ proceeding.

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[1] We also decided a second writ petition in this matter. (See *Los Angeles Times v. Superior Court* (2003) 114 Cal.App.4th 247, 7 Cal.Rptr.3d 524.)

On July 9, 2004, Does 1 and 2 moved to quash the new subpoenas. The Archdiocese followed with its own motion to quash.

On September 7, 2004, the referee issued a decision which substantially rejected petitioners' motions to quash. Out of the approximately 285 subpoenaed documents challenged by petitioners below, the referee sustained 53 objections and ordered the remaining documents turned over to the grand jury. Of the 53 sustained objections, one was based on the attorney-client privilege (Evid.Code, § 954), two were based on the clergy-penitent privilege (Evid.Code, §§ 1033-1034), and 50 were based on the physician-patient privilege (Evid.Code, § 1014). The referee stayed disclosure of the documents to enable the parties to seek review.

Thereafter, the Archdiocese filed a petition for writ of mandate in this court seeking to prevent disclosure of 15 documents the referee had ruled could go to the grand jury. The Priests filed their own petition for writ of mandate asking this court to prevent the disclosure of *any* documents to the grand jury. The petitions were consolidated, an order to show cause was issued, production of documents was stayed, and briefing was obtained from the parties.

An amicus curiae brief from Monsignor Thomas Green, a professor of canon law, was filed in support of petitioners' claims.

FACTUAL BACKGROUND

1. *Petitioners' claim the subpoenaed documents cannot be disclosed to grand jury.*

Petitioners contend the referee erred in ruling the subpoenaed documents should be disclosed to the grand jury because compliance with the subpoenas would violate constitutional and statutory rules. Petitioners assert a Catholic bishop has a religious obligation to care for the physical, emotional and spiritual well-being of the priests within his diocese. Petitioners argue all the communications arising out of this obligation, including communications with the accused priests and the psychotherapists who treat them, are protected from disclosure by the constitutional right to freedom of religion and by California's psychotherapist-patient and clergy-penitent evidentiary privileges. In support of these claims, petitioners submitted evidentiary declarations, which were opposed by declarations filed by the District Attorney.

2. *Petitioners' evidentiary declarations; their reliance on the church's "formation of clergy" doctrine.*

In declarations supporting its motion to quash, the Archdiocese asserted that according to Roman Catholic doctrine, bishops are the direct successors of the 12 apostles of Jesus Christ.[2] Under the church's *formation of clergy* doctrine, a bishop is charged with the responsibility of sanctifying his priests, and is obligated to "care for and treat any emotional, physical, or spiritual problem a priest

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[2] We express no opinion regarding the validity of any interpretation of religious doctrine contained in these declarations.

may be experiencing."[3] In carrying out this obligation, a bishop "may establish detailed boundaries for his priests concerning chastity" and "pass judgment in particular cases concerning the observance of this obligation. The bishop is obliged to intervene and judge inappropriate conduct of any priest and to impose restrictions and penalties as appropriate in his moral judgment." The Archdiocese argued these tasks require "open communications between the bishop and his priests."

A bishop "is permitted to appoint Episcopal vicars. An Episcopal vicar has the same power as a Bishop in the specific type of activity for which he is appointed." The Archbishop in Los Angeles, Cardinal Mahony, has appointed such a vicar, called the Vicar for Clergy, who is obligated to care for the "emotional, physical, psychological and spiritual lives" of the archdiocesan priests. Monsignor Craig Cox, who is both a canon lawyer and the Vicar for Clergy, declared Cardinal Mahony had established policies for the Archdiocese under which accusations of clerical sexual misconduct immediately are investigated. "The involved priest is confronted and is encouraged to discuss whatever problems he is experiencing regarding chastity." "Msgr. Cox states 'Based on the fundamental religious relationship between the bishop and his priest, the priest

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[3] This citation comes from the referee's final decision in this matter. Although this, and similar factual statements, originated in declarations filed by the parties in this court, most of those declarations have been filed under seal. Therefore, this opinion will refer to the facts alleged below either by citing the referee's decision, which is not under seal, or by referring generically and circumspectly to documents presently filed under seal. (See *Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 105, 4 Cal.Rptr.3d 823; *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 308, 116 Cal.Rptr.2d 833.)

is encouraged to communicate his deepest psychological and sexual issue[s], to undergo psychiatric evaluation and treatment, and to share the results of this therapy with the Vicar and the Bishop. *All of this for the purpose of the ongoing formation and sanctification of the priest.*'" (Italics added.)

If "a canonical investigation of a boundary violation or accusation of sexual misconduct [is required], the process is conducted in accord with the requirements of Canons 1717-1719"[4] and pursuant to Archdiocesan practice. These Canons require the bishop to inquire carefully either personally or through some acceptable person, about the facts and circumstances and about the imputability of the offense. [¶] . . . [T]o date, the bishops and priests have always understood that these records would be confidential, and files covering these materials would be kept separately from the priest's normal personnel file."

3. *The District Attorney's evidentiary declarations.*

In an attempt to rebut petitioners' evidentiary claims, the District Attorney submitted declarations from Thomas Doyle, a Roman Catholic priest who is also an expert in canon law.

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[4] Canon 1717, § 1, provides, in part: "'Whenever an ordinary has knowledge, which at least seems true of a delict, he is carefully to inquire personally about the fact. . . . '" "Canon 1719 states in part: '[T]he acts of the investigation, the decrees of the ordinary *which initiated and concluded the investigation*, and everything which preceded the investigation are to be kept in the secret archive of the curia if they are not necessary for the penal process."

Fr. Doyle stated it is expected the preliminary investigation, required by Canons 1717-1719, will generate a written record. "The information contained in the record may be sensitive and is to be treated accordingly with due regard for the reputations of those involved. It may however, be licitly and properly disclosed to civil law enforcement agencies if it involves [a] matter as serious as sexual abuse." Fr. Doyle asserted "investigations of child abuse documented by the Archdiocese, through the Vicar for Clergy, which are kept in the 'secret archives' (confidential files) can be and have been supplied to law enforcement in other jurisdictions."

4. *Referee's final decision on petitioners' claims.*

In his final decision, the referee rejected petitioners' claims all the subpoenaed documents had arisen out of the Archbishop's religious obligation to care for the physical, emotional and spiritual well-being of his priests, and, therefore, that disclosing them to the grand jury would violate a constitutional right to freedom of religion, California's evidentiary privileges for clergy-penitent and psychotherapist-patient communications, and various other rules of law.

The referee held the subpoenas violated neither the free exercise clause nor the establishment clause of the federal Constitution. Further, compliance with the subpoenas would not impermissibly burden petitioners' religious beliefs or practice under *Employment Div., Ore, Dept. of Human Res. v. Smith* (1990) 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (*Smith*), nor would it create an impermissible governmental entanglement with internal church affairs under *Lemon v. Kurtzman* (1971) 403

U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745. As for California's free exercise clause, even under the pre-*Smith* (*Smith, supra,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876), compelling state interest test, disclosure was required because the government has a compelling interest in prosecuting child molesters.

While the referee found evidence in the record to support the assertion Cardinal Mahony had a religious obligation to care for his priests, he also found the Archdiocese simultaneously had been engaged in the kind of routine investigation any employer would undertake upon learning a trusted employee had been accused of child molestation. In addition, the referee held the clergy-penitent privilege was inapplicable where the communication had been disclosed to a third person.

Regarding the principal remaining issues, the referee concluded the psychotherapist-patient privilege protected some of the subpoenaed documents, that the prosecution of Doe 1 and Doe 2 was not precluded by the United States Supreme Court's statute of limitations ruling in *Stogner v. California, supra,* 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544, that the prosecutor had not improperly manipulated the grand jury process, and that the subpoenas were not impermissibly vague or overbroad.

CONTENTIONS

Petitioners' chief contentions are that disclosure of the subpoenaed documents is barred by the First Amendment of the federal Constitution and by the free exercise clause of the California Constitution, as well as by Evidence Code provisions relating to the clergy-penitent and psychotherapist-patient privileges.

Additionally, petitioners contend disclosure of the subpoenaed documents is barred by California's attorney-client and work product privileges; under *Stogner v. California, supra,* 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544, disclosure of the subpoenaed documents is barred by the ex post facto clause; the District Attorney improperly usurped the grand jury's authority; the subpoenas duces tecum were impermissibly vague and were issued without proper authority and without the requisite good faith affidavit; and disclosure of the subpoenaed documents is barred by assorted statutory and constitutional rules.

DISCUSSION

1. *Constitutional right to freedom of religion does not bar disclosure of the subpoenaed documents.*

Petitioners contend the disputed documents[5] cannot be turned over to the grand jury without violating their right to freedom of religion. In particular, they claim disclosure of the subpoenaed documents will violate the free exercise and establishment clauses of the First Amendment to the federal Constitution, as well as the free exercise clause of the California Constitution. For the reasons explained below, petitioners' contention is without merit.

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[5] While the Archdiocese is challenging only the disclosure of 15 documents, the Priests are disputing every single document the referee ordered turned over to the grand jury.

a. *General principles.*

"The Religion Clauses of the First Amendment provide: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' The first of the two Clauses, commonly called the Establishment Clause, commands a separation of church and state. The second, the Free Exercise Clause, requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." (*Cutter v. Wilkinson* (2005) ___ U.S. ___, 125 S.Ct. 2113, 2120, 161 L.Ed.2d 1020.) The First Amendment "safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." (*Cantwell v. Connecticut, supra,* 310 U.S. 296, 303-304, 60 S.Ct. 900, 84 L.Ed. 1213, fn. omitted.)

Judicial decisions regarding the religion clauses of the First Amendment are subject to de novo review. (See *Rubin v. City of Burbank* (2002) 101 Cal.App.4th 1194, 1199, 124 Cal.Rptr.2d 867 [establishment clause challenge to religious invocation at municipal function reviewed de novo].)

b. *No violation of the free exercise clause of the federal Constitution.*

Petitioners' contention disclosure of the subpoenaed documents would violate the free exercise clause of the federal Constitution is defeated by *Smith.*

(1) *Smith's new rule for evaluating free exercise claims rests on "neutral laws of general applicability."*

In *Smith, supra,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, a case involving peyote use by members of the Native American Church in a state (Oregon) which had not granted an exemption for sacramental use of the drug, the United States Supreme Court adopted a new rule for evaluating free exercise claims. *Smith* rejected the former balancing test (see *Sherbert v. Verner* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965), under which "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest," reasoning "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." (*Smith, supra,* 494 U.S. at pp. 878-879, 883, 110 S.Ct. 1595.) Under the new rule, "the right of free exercise does not relieve an individual of the obligation to comply with a *'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'* [Citation.]" (*Id.* at p. 879, 110 S.Ct. 1595, italics added.)

In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472, the United States Supreme Court summed up its newly-announced rule "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that *a law that is neutral and of general applicability need not be justified by a compelling*

governmental interest even if the law has the incidental effect of burdening a particular religious practice. . . . A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." (*Id.* at pp. 531-532, 113 S.Ct. 2217, italics added.)

Although *Smith* involved criminal conduct, the case is not limited to such situations. As *Smith* commented, "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, *like its ability to carry out other aspects of public policy,* 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' [Citation.] To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' – permitting him, by virtue of his beliefs, 'to become a law unto himself,' [citation] – contradicts both constitutional tradition and common sense." (*Smith, supra,* 494 U.S. at p. 885, 110 S.Ct. 1595, fn. omitted, italics added; see *Gary S. v. Manchester School Dist.* (1st Cir.2004) 374 F.3d 15, 18 [rejecting argument *Smith* was "limited to instances of socially harmful or criminal conduct," court applied *Smith* to claim the Individuals with Disabilities Education Act was unconstitutional as applied to disabled child attending Catholic elementary school].)

Smith is applicable here and defeats petitioners' contention the First Amendment's free exercise clause bars disclosure of the subpoenaed documents.

(2) *The "ecclesiastical abstention" doctrine does not apply.*

Petitioners, however, argue an exception to the *Smith* rule applies, namely, the ecclesiastical abstention doctrine. This doctrine grew out of the so-called "church property cases." However, the church property cases, as exemplified by the ones cited by the Archdiocese, are inapposite because they involve internal church disputes whose resolution crucially depend on interpretations of religious doctrine.[6]

However, the case at bar is not, at its core, an *internal* church dispute. It is a criminal investigation into suspected child molestation allegedly committed by Catholic priests. *Smith* itself characterized the church property decisions as cases in which the government was impermissibly "lend[ing] its power to one or the other side in controversies over religious authority or dogma." (*Smith, supra,* 494 U.S. at p. 877, 110 S.Ct. 1595.) The case at bar does not involve an internal church dispute over religious authority or dogma.

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[6] The Archdiocese relied on the following church property cases. *Watson v. Jones* (1872) 80 U.S. (13 Wall.) 679, 20 L.Ed. 666, 1871 WL 14848, arose out of a schism in the Presbyterian Church during the Civil War about the morality of slavery, which led to legal disputes between rival congregations over entitlement to church property. *Watson* deferred to a ruling by the church's national governing body. In *Kedroff v. St. Nicholas Cathedral* (1952) 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120, where the right to use church property depended on the validity of a religious official's ecclesiastical appointment, the court deferred to the church's own ruling. *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151, reversed a decision, reinstating a defrocked bishop, predicated on the lower court's theory the church's internal disciplinary process had been defective.

(3) *The "ministerial exception" doctrine does not apply.*

Petitioners also argue the *Smith* rule does not defeat their free exercise claim because the so-called "ministerial exception" doctrine applies. Petitioners' reliance on this exception is misplaced.

The ministerial exception doctrine is based on the notion a church's appointment of its clergy, along with such closely related issues as clerical salaries, assignments, working conditions and termination of employment, is an inherently religious function because clergy are such an integral part of a church's functioning as a religious institution. (See, e.g., *Werft v. Desert Southwest Annual Conference* (9th Cir.2004) 377 F.3d 1099, 1101.) This is not an employment case and the ministerial exception doctrine has no application here.

(4) *Smith applies to these grand jury subpoenas.*

The Archdiocese contends *Smith* is inapplicable because there is no legislative act at issue, and because subpoenas are not neutral laws of general application. This argument misconstrues the notion of generally applicable neutral laws. "A law is not neutral towards religion if its 'object . . . is to infringe upon or restrict practices because of their religious motivation. . . . ' [Citation.] A law is not generally applicable if it 'in a selective manner impose[s] burdens only on conduct motivated by religious belief. . . . '" (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 550, 10 Cal.Rptr.3d 283, 85 P.3d 67.) The neutral law of general

applicability at issue here is the statutory and common law[7] basis of California's grand jury process. That this particular grand jury investigation and the subpoenas it generated are directed at a Catholic archdiocese is merely an incidental effect of the grand jury process.

In *Matter of Grand Jury Subpoena (Chinske)* (D.Mont.1991) 785 F.Supp. 130, the petitioner claimed that having to comply with a grand jury subpoena would violate his religious beliefs. At oral argument, the petitioner's attorney "attempted to distinguish *Smith* . . . by claiming that the compulsion to testify before the grand jury is not a law of general application prohibiting certain conduct." (*Id.* at p. 133.) Commenting that "[c]ounsel clearly does not appreciate the scope of the Supreme Court's recent rulings concerning free exercise claims," the federal court held "*Smith* clearly does not apply only to cases where the law in question prohibits certain conduct, since the court considered tax collection cases in reaching its decision. [Citation.] The laws of this land compel all persons to pay taxes assessed by various governmental bodies, regardless of their religious convictions, . . . In much the same way, the laws of this land compel all persons to testify before the grand jury when subpoenaed to do so. . . . " (*Id.* at pp. 133-134.) Assuming for the purpose of decision that the petitioner's religious beliefs were sincere, the court held the free exercise claim was defeated by *Smith* because any burden on petitioner's religious

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[7] As this court pointed out in *M.B. v. Superior Court, supra,* 103 Cal.App.4th at pp. 1388-1389, 127 Cal.Rptr.2d 454 "our Supreme Court has emphatically 'rejected the contention that the California grand jury [is] a "purely" statutory body, wholly distinct from its common law predecessor.' (*People v. Superior Court (1973 Grand Jury)* (1975) 13 Cal.3d 430, 440, fn. 11, 119 Cal.Rptr. 193, 531 P.2d 761. . . .)"

beliefs was not the object of the grand jury subpoena, but "'merely the incidental effect of a generally applicable and otherwise valid' governmental action." (*Id.* at p. 134.)

We similarly conclude the grand jury subpoenas here do not violate the free exercise clause of the federal Constitution because they are based on a valid and neutral law of general applicability that will have, at most, an incidental effect on the Archdiocese's practice of keeping confidential the communications arising out of the Archbishop's formation of clergy obligation of caring for his priests.

c. *No violation of the establishment clause of the federal Constitution.*

Petitioners contend disclosure of the subpoenaed documents is barred by the establishment clause of the federal Constitution. This claim is without merit because the primary effect of enforcing the subpoenas will not require the government either to interfere with the internal workings of the Archdiocese, or to choose between competing religious doctrines.

"The Establishment Clause provides that 'Congress shall make no law respecting an establishment of religion. . . .' [Citation.] In *Lemon v. Kurtzman,* 403 U.S. 602[, 91 S.Ct. 2105, 29 L.Ed.2d 745] . . . (1971), the Supreme Court established a three-part test for determining whether a statute violates the Establishment Clause: [¶] First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion. [Citation.]" (*E.E.O.C. v. Catholic University*

of America (D.C.Cir.1996) 83 F.3d 455, 465.) "Although it is difficult to attach a precise meaning to the word 'entanglement,' courts have found an unconstitutional entanglement with religion in situations where a 'protracted legal process pit[s] church and state as adversaries,' [citation], and where the Government is placed in a position of choosing among 'competing religious visions.' [Citation.]" (*Ibid.*) "Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, [citation], and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." (*Agostini v. Felton* (1997) 521 U.S. 203, 233, 117 S.Ct. 1997, 138 L.Ed.2d 391.)

The Archdiocese asserts that, under *Lemon*, "[t]he constitutional question can be simply put: Does the state action (here it is a subpoena) interfere with a religious practice?" The Archdiocese answers this question as follows "The effect of these subpoenas is to interfere with the bishop's pastoral and episcopal relationship with his priests in need, to destroy any serious pastoral discussion of deeply personal and intimate concerns of the priests regarding their celibacy, sexuality and emotional and psychological needs, and to 'foster an "excessive government entanglement with religion."' [Citation.] More specifically, these subpoenas interfere directly with ecclesiastical policy by mandating the disclosure of information that, under Roman Catholic practice, is held in strict confidence."

The Archdiocese asserts the closest Supreme Court decision to the case at bar is *NLRB v. Catholic Bishop of Chicago* (1979) 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533, which held the Board's exercise of jurisdiction over

lay teachers at Catholic high schools presented a significant First Amendment risk. However, the core issue in that case was whether there had been unfair labor practices, and it was this issue which was necessarily entangled with questions of religious doctrine.[8]

However, the core issue in the case at bar is whether children were molested by priests who worked for the Archdiocese, an issue having no comparable religious doctrine aspect.

Also pertinent here is *Society of Jesus of New England v. Com.* (2004) 441 Mass. 662, 808 N.E.2d 272, in which the Massachusetts Supreme Judicial Court rejected a claim that disclosure of a priest's personnel file, in connection with a criminal prosecution for sexual assault, would violate the establishment clause. The court explained "With regard to the test of 'effect' on religion, we must look at the law's 'principal or primary effect,' *Lemon v. Kurtzman, supra,* not at its incidental effects. Here, the alleged inhibition on religion is not a 'principal or primary' effect of the subpoena, although it may, in a subtle way, provide some disincentive that would arguably discourage accused priests from being totally forthcoming with their superiors. . . . [¶] *Nor does the enforcement of this subpoena result in any excessive government entanglement with religion.* The court can decide issues of relevance, burdensomeness, and

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[8] The case involved "charges of unfair labor practices filed against religious schools," to which "the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the [NLRB], in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." (*NLRB v. Catholic Bishop of Chicago, supra,* 440 U.S. at p. 502, 99 S.Ct. 1313.)

the applicability of the asserted privileges without having to decide matters of religion or embroil itself in the internal workings of the Jesuits. Indeed, the only form of 'entanglement' with religion at issue in the motions to quash is a form that [the priest] and the Jesuits have themselves invited, namely, the court's consideration whether [the priest's] communications qualify for protection under the priest-penitent privilege. . . . Assessment of the applicability of that privilege does not lead to excessive government entanglement in religion." (*Id.* at p. 283, fn. omitted, italics added.)

This case is analogous to *Society of Jesus of New England v. Com., supra,* 441 Mass. 662, 808 N.E.2d 272, rather than to *NLRB v. Catholic Bishop of Chicago, supra,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533. We conclude disclosure of the subpoenaed documents to the grand jury will not result in excessive entanglement or any other violation of the establishment clause.

d. *"Hybrid rights" exception to Smith not applicable.*

Petitioners contend disclosure of the subpoenaed documents would violate the First Amendment because the so-called "hybrid rights" exception to the *Smith* rule applies in this case. The Archdiocese argues "the neutrality rule of *Smith* does not apply" here because "the challenged state conduct interferes with the free exercise of religion *and* causes excessive entanglement." This claim is without merit.

As a doctrinal matter, the nature and scope of the so-called hybrid exception to *Smith* is rather nebulous. "The *Smith* court developed the hybrid claim exception in an effort to explain several past decisions which invalidated

on free exercise grounds laws that appeared to be neutral and generally applicable. [Citation.]" (*Gary S. v. Manchester School Dist.* (D.N.H.2003) 241 F.Supp.2d 111, 121, fn. omitted, affd. (1st Cir.2004) 374 F.3d 15, 19.) "The most relevant of the so-called hybrid cases is *Wisconsin v. Yoder,* 406 U.S. 205, 232-33 . . . [92 S.Ct. 1526, 32 L.Ed.2d 15] (1972), in which the Court invalidated a compulsory school attendance law as applied to Amish parents who refused on religious grounds to send their children to school." (*Brown v. Hot, Sexy and Safer Productions, Inc.* (1st Cir.1995) 68 F.3d 525, 539.) Under the hybrid rights theory, " 'the First Amendment [still] bars application of a neutral, generally applicable law to religiously motivated action' if the law implicates not only 'the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press[.]' [Citation.] In such 'hybrid' cases, the law or action must survive strict scrutiny." (*San Jose Christian College v. Morgan Hill* (9th Cir.2004) 360 F.3d 1024, 1031.)

However, even assuming a hybrid rights exception to *Smith,* it would not apply to this case because the Archdiocese merely has combined a free exercise claim with a meritless establishment clause claim. (See *Catholic Charities of Sacramento, Inc. v. Superior Court, supra,* 32 Cal.4th at p. 559, 10 Cal.Rptr.3d 283, 85 P.3d 67, fn. 15 ["Catholic Charities perfunctorily asserts that its claims under the establishment clause [citation] also justify treating this case as involving hybrid rights. We have, however, already determined that those claims lack merit."].) Hence, *Smith's* "valid and neutral rule of law of general applicability" standard does apply to petitioners' federal free exercise claim.

e. *California free exercise claim is meritless.*

Petitioners contend the *Smith* rule does not apply to a free exercise claim under the California Constitution and that we should apply, instead, the pre-*Smith* compelling state interest test. However, we conclude that even pursuant to the former strict scrutiny test, under which governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest, disclosure of the subpoenaed documents would not violate petitioners' rights. Therefore, we need not decide whether *Smith* applies to California's free exercise clause.

California's free exercise clause (Cal. Const., art. I, § 4.) provides "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State."

The *Smith* case was decided in 1990. In 2004, the California Supreme Court was faced in *Catholic Charities of Sacramento, Inc.v. Superior Court, supra,* 32 Cal.4th 527, 10 Cal.Rptr.3d 283, 85 P.3d 67 with a claim that the pre-*Smith* test applies to California's free exercise clause because its language differs from the federal free exercise clause.[9] "Catholic Charities' final argument for applying strict scrutiny invokes the free exercise clause of the California Constitution. [Citation.] That clause, Catholic Charities contends, forbids the state to burden the practice

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[9] Whereas the federal clause prevents Congress from passing any law prohibiting the free exercise of religion, California's free exercise clause guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference. . . ."

of religion, even incidentally, through a neutral, generally applicable law, unless the law in question serves a compelling governmental interest and is narrowly tailored to achieve that interest. Catholic Charities asserts, in other words, that we must interpret the California Constitution the same way the United States Supreme Court interpreted the federal Constitution's free exercise clause in *Sherbert, supra,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965." (*Id.* at p. 559, 10 Cal.Rptr.3d 283, 85 P.3d 67, fn. omitted.)

Saying that in the proper case it would not have hesitated "to declare the scope and proper interpretation of the California Constitution's free exercise clause," *Catholic Charities* concluded it did not need to do so because the pre-*Smith* strict scrutiny test[10] had been met. *Catholic Charities* involved the claim by a religiously-connected nonprofit public benefit corporation that it had been impermissibly burdened by the Women's Contraception Equity Act (WCEA), a law requiring certain health and disability contracts to cover prescription contraceptives. The Supreme Court held "Assuming for the sake of argument the WCEA substantially burdens a religious belief or practice, the law nevertheless serves a compelling state interest and is narrowly tailored to achieve that interest. [¶] The WCEA serves the compelling state interest of eliminating gender discrimination." (*Catholic Charities of*

[10] "Under [the strict scrutiny] standard, a law could not be applied in a manner that substantially burdened a religious belief or practice unless the state showed that the law represented the least restrictive means of achieving a compelling interest or, in other words, was narrowly tailored." (*Catholic Charities of Sacramento, Inc. v. Superior Court, supra,* 32 Cal.4th at p. 562, 10 Cal.Rptr.3d 283, 85 P.3d 67.)

Sacramento, Inc. v. Superior Court, supra, 32 Cal.4th at pp. 563-564, 10 Cal.Rptr.3d 283, 85 P.3d 67.)

We reach a similar conclusion here. As the following case law demonstrates, the grand jury's investigation into suspected child molestation serves a compelling state interest and is narrowly tailored to achieve that interest.

In *Branzburg v. Hayes* (1972) 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626, in the course of holding that reporters may be required to testify before grand juries about the criminal conduct of their confidential sources, the United States Supreme Court said "Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle [is] that '*the public . . . has a right to every man's evidence,*' except for those persons protected by a constitutional, common-law, or statutory privilege. . . . " (*Id.* at p. 688, 92 S.Ct. 2646, italics added.) "The requirements of those cases, [citation], which hold that a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights, are also met here. As we have indicated, *the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen,* and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called 'bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.' [Citation.]" (*Id.* at p. 700, 92 S.Ct. 2646, italics added.)

With a nod to *Branzburg,* many federal cases since have held that compelled testimony before a grand jury in violation of a witness's religion does not constitute a free

exercise violation. We rely on federal cases in this context because (1) before *Smith* was decided, both the federal and the California free exercise clauses were analyzed under the compelling state interest test (see *Walker v. Superior Court* (1988) 47 Cal.3d 112, 138-141, 253 Cal.Rptr. 1, 763 P.2d 852), and (2) we have found no California cases involving free exercise clause claims in a grand jury context.

These federal cases have assumed, for the purpose of decision, that the witness's objection to testifying was both sincerely held and religiously grounded. Each case concluded the ensuing burden on the witness's religious belief was outweighed by the compelling state interest in obtaining grand jury testimony. (See *In re Grand Jury Empaneling of Special Grand Jury* (3d Cir.1999) 171 F.3d 826, 832 [even if Orthodox Jewish law proscribed giving grand jury testimony against family member, "the government's interest in securing the evidence" in white collar crime case was "compelling" because "the duty to prosecute persons who commit serious crimes is part and parcel of the government's 'paramount responsibility for the general safety and welfare of all its citizens' "]; *Grand Jury Proceedings of John Doe v. U.S.* (10th Cir.1988) 842 F.2d 244, 247-248 [Mormon belief proscribing intra-family testimony before grand jury was outweighed by compelling state interest in investigating violation of federal criminal law]; *In re Three Children* (D.N.J.1998) 24 F.Supp.2d 389, 392 ["the government's interest in investigating and successfully prosecuting crimes, which invariably includes taking the grand jury testimony of witnesses, far outweighs the incidental burden on the professed free exercise of religion in this matter."]; see also *Congregation B'Nai Jonah v. Kuriansky* (1991) 576 N.Y.S.2d 934, 936 [172 A.D.2d 35,

39] [state's interest in enforcing subpoenas for Medicaid fraud investigation outweighed infringement on free exercise "Unquestionably, the State has a profound interest in fighting corruption in the Medicaid industry and in enforcing its tax laws [citations]."].)

The Priests also argue that because the "documents pertain to confidential communications of a most private nature between a Roman Catholic bishop and the priests he ordained," their disclosure "will chill the free exercise of their religion, and inevitably and impermissibly alter the relationship [between] Catholic bishops and priests and the way they practice their religion."

However, several jurisdictions have rejected similar arguments and we agree with their reasoning. (See *People v. Campobello* (2004) 348 Ill.App.3d 619, 284 Ill.Dec. 654 658-59, 810 N.E.2d 307, 311-312 [Catholic diocese must comply with government subpoena in sexual assault prosecution against priest, even if Canon 489 requires bishop to maintain secret archive for files relating to internal Church discipline]; *Com. of Penn. v. Stewart* (1997) 547 Pa. 277 [690 A.2d 195, 201-202] [criminal defendant's compelling interest in fair trial outweighed Catholic diocese's claim to withhold documents deemed confidential under canon law because "the burden on the Diocese's religious freedom furthers a compelling governmental interest by the least restrictive means available"]; *Society of Jesus of New England v. Com., supra,* 441 Mass. 662, 808 N.E.2d 272, 279 [state could subpoena personnel file of priest charged with sexual assault even if such disclosure would inhibit " communications that are necessary to maintain the Jesuits' relationship with one of its own priests"].)

Hence, we conclude that even if the pre-*Smith* compelling state interest test governs a California free exercise claim, that test is met here.

f. *Conclusions regarding federal and state constitutional contentions.*

We are not persuaded by any of petitioners' freedom of religion arguments. We conclude disclosure of the subpoenaed documents is not barred by the First Amendment to the federal Constitution, or by the free exercise clause of California's Constitution. Having so determined, we next examine the two principal statutory grounds petitioners rely on to prevent disclosure of the subpoenaed documents to the grand jury, the clergy-penitent privilege and the psychotherapist-patient privilege.

2. *Documents in question do not satisfy criteria for application of clergy-penitent privilege, irrespective of the formation of clergy theory.*

Evidence Code section 1032, within the article relating to the clergy-penitent privilege, defines a "penitential communication" as "a communication made in confidence, *in the presence of no third person* so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or

organization, *has a duty to keep those communications secret.*" (Italics added.)[11]

Petitioners argue the subpoenaed documents constitute privileged penitential communications within the meaning of Evidence Code section 1032 because they were generated in the course of the formation of clergy process during the Archdiocese's interventions to help troubled priests.

Petitioners' contention fails. The penitential communications are not privileged because they were not "made in confidence, in the presence of no third person so far as the penitent is aware," to a cleric who is obligated "to keep those communications secret." (Evid.Code, § 1032.)

a. *Statutory scheme is controlling.*

"Evidence Code section 911 provides, in relevant part: 'Except as otherwise provided by statute: [¶] . . . [¶] (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.' This section declares the California Legislature's determination that 'evidentiary privileges shall be available *only*

[11] The other clergy-penitent privilege statutes provide that: "a 'member of the clergy' means a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization" (Evid.Code, § 1030); " 'penitent' means a person who has made a penitential communication to a member of the clergy" (Evid.Code, § 1031); "[s]ubject to [Evidence Code] Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege" (Evid.Code, § 1033); and, "[s]ubject to [Evidence Code] Section 912, a member of the clergy, whether or not a party, has a privilege to refuse to disclose a penitential communication if he or she claims the privilege" (Evid.Code, § 1034).

as defined by statute. [Citation.] Courts may not add to the statutory privileges except as required by state or federal constitutional law [citations], nor may courts imply unwritten exceptions to existing statutory privileges. [Citations.]' (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373, 20 Cal.Rptr.2d 330, 853 P.2d 496 . . . see *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656, 125 Cal.Rptr. 553, 542 P.2d 977) . . . [privileges contained in Evidence Code are exclusive and courts are not free to create new privileges as matter of judicial policy unless constitutionally compelled]. . . . " (*American Airlines, Inc. v. Superior Court* (2003) 114 Cal.App.4th 881, 887, 8 Cal.Rptr.3d 146, italics added.)

"In section 911 of the Evidence Code, the Legislature clearly intended to abolish common law privileges and to keep the courts from creating new nonstatutory privileges as a matter of judicial policy. [Citations.] Thus, unless a privilege is expressly or impliedly based on statute, its existence may be found only if required by constitutional principles, state or federal." (*Welfare Rights Organization v. Crisan* (1983) 33 Cal.3d 766, 769, 190 Cal.Rptr. 919, 661 P.2d 1073.)

b. *Parties' respective burdens of proof.*

Ordinarily, "[t]he party claiming [an evidentiary] privilege carries the burden of showing that the evidence which it seeks to suppress is within the terms of the statute." (*D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 729, 36 Cal.Rptr. 468, 388 P.2d 700; see, e.g., *Department of Motor Vehicles v. Superior Court* (2002) 100 Cal.App.4th 363, 370, 122 Cal.Rptr.2d 504 [per *Chadbourne,* DMV bore burden of establishing claim of privilege

based on Evid.Code, § 1040 (public entity has privilege to resist disclosure of official information)].)

Here, however, it was ultimately the District Attorney's burden to overcome the presumption of confidentiality.

Evidence Code section 917 provides at subdivision (a) "Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, *psychotherapist-patient, clergy-penitent,* husband-wife, sexual assault victim-counselor, or domestic violence victim-counselor relationship, *the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.*" (Italics added.)

Thus, in this context, the privilege-claimant "has the *initial burden* of proving the *preliminary facts* to show the privilege applies." (*Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1014, 135 Cal.Rptr.2d 532, italics added.)[12] "Once the claimant establishes the preliminary facts . . . , *the burden of proof shifts to the opponent of the privilege.* To obtain disclosure, the opponent must rebut the statutory presumption of confidentiality set forth in [Evidence Code] section 917[, subdivision (a).] . . . Alternatively,

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[12] Thus, for example, where the psychotherapist-patient privilege is claimed, " '[p]reliminary facts' means the existence of a psychotherapist-patient relationship, 'that is, that the person [the claimant] consulted was a " 'psychotherapist' " within the meaning of . . . section 1010, and [the claimant] was a " 'patient' " within the meaning of . . . section 1011.' [Citation.]" (*Story v. Superior Court, supra,* 109 Cal.App.4th at p. 1014, 135 Cal.Rptr.2d 532.)

the opponent of the privilege may show that the privilege has been waived under [Evidence Code] section 912[13]. . . . " (*Id.* at p. 1015, 135 Cal.Rptr.2d 532, italics added.)

c. *Standard of review.*

We review the trial court's privilege determination under the substantial evidence standard. "'"When the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it [citations]."' [Citation.] Accordingly, unless a claimed privilege appears as a matter of law from the undisputed facts, an appellate court may not overturn the trial court's decision to reject that claim." (*HLC Properties, Limited v. Superior Court* (2005) 35 Cal.4th 54, 60, 24 Cal.Rptr.3d 199, 105 P.3d 560, fn. omitted.)

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[13] Evidence Code section 912, subdivision (a), provides: "Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), 1035.8 (sexual assault counselor-victim privilege), or 1037.8 (domestic violence counselor-victim privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege."

d. *Development of California's clergy-penitent privilege.*

"The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive clerical consolation in return." (*Trammel v. United States* (1980) 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186.) "The present day clergy-penitent privilege has its origin in the early Christian Church sacramental confession which existed before the Reformation in England. It has evolved over the years into the contemporary 'minister's' privilege adopted in some form in virtually every state of this country. (Yellin, *The History and Current Status of the Clergy-Penitent Privilege* (1983) 23 Santa Clara L.Rev. 95.)" (*People v. Edwards* (1988) 203 Cal.App.3d 1358, 1362-1363, 248 Cal.Rptr. 53.)

As noted, California's clergy-penitent privilege is contained in Evidence Code sections 1030-1034. Before these sections were enacted in 1965, the privilege was defined by Code of Civil Procedure section 1881, subdivision (3), which provided "A clergyman, priest or religious practitioner of an established church cannot, without the consent of the person making the *confession,* be examined as to any *confession* made to him in his professional character in the course of discipline enjoined by the church to which he belongs." (Italics added.) The current statute makes no reference to confessions, and instead provides an evidentiary privilege for "'penitential communication.'" (Evid.Code, § 1032.)

e. *For clergy-penitent privilege to attach, requirements of Evidence Code section 1032 must be satisfied.*

The central provision of California's clergy-penitent privilege is Evidence Code section 1032, which defines a penitential communication as a confidential communication made to a clergy person who is authorized to hear and obligated to keep secret such communications.

However, even with the privilege centered on a "communication," rather than on a "confession," not every statement made to a member of the clergy is privileged. "In order for a statement to be privileged, it must satisfy all of the conceptual requirements of a penitential communication: 1) *it must be intended to be in confidence;* 2) it must be made to a member of the clergy who in the course of his or her religious discipline or practice is authorized or accustomed to hear such communications; and 3) such member of the clergy *has a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret.* (§ 1032; 2 jefferson, cal. evidence benchbook (2d ed.1982) § 39.1, pp. 1405-1407.)" (*People v. Edwards, supra,* 203 Cal.App.3d at pp. 1362-1363, 248 Cal.Rptr. 53, italics added.)

f. *Petitioners' theory as to why clergy-penitent privilege is applicable.*

Mindful of the criteria of Evidence Code section 1032 requiring a communication to be made in confidence, in the presence of no third person, to a member of the clergy who is authorized to hear the communication and who, under the tenets of the church, has a duty to keep said communication secret, the petitioners invoke the Roman Catholic church's formation of clergy doctrine. They

presented evidence below showing that pursuant to this religious doctrine, a bishop is charged with the obligation to care for the physical, spiritual, emotional and psychological well-being of the priests within his diocese. Further, the obligation imposed by this doctrine includes intervention with priests who are experiencing problems related to celibacy and sexuality, including an "intervention interview" with the accused priest. The evidence also showed the Los Angeles Archdiocese encouraged priests to discuss such problems with Cardinal Mahony and the Vicar for Clergy.

The Archdiocese argues the challenged subpoenaed documents fall within California's clergy-penitent privilege because they were confidential communications made in the course of troubled-priest interventions, and under the tenets of the Church, Cardinal Mahony and the Vicar for Clergy were authorized to hear the communications and obligated to keep them secret. The Archdiocese also presented evidence the interventions with troubled priests depend on the troubled priests' understanding the communications will be held in confidence *within the Church.*

g. *Subject communications do not meet criteria of Evidence Code section 1032.*

Petitioners' theory conflicts with Evidence Code section 1032, which defines a "penitential communication" as "a communication made in confidence, *in the presence of no third person* so far as the penitent is aware," to a clergy person who must keep the communication secret. (Italics added.)

The record demonstrates the participants in the Archdiocese's troubled-priest interventions knew any

communications likely were to be shared with more than one person. According to the Archdiocese's declared policy, priests experiencing psychological and sexual problems were encouraged to discuss those problems with the Archbishop and the Vicar for Clergy. Furthermore, the subpoenaed documents themselves amply demonstrate that communications to and from the individual priests were routinely shared by Cardinal Mahony, whoever happened to be the current Vicar for Clergy, and sometimes other Archdiocese employees as well.

This sharing of information violates Evidence Code section 1032's requirement that the penitent's communication be "made in confidence, in the presence of no third person so far as the penitent is aware," to a cleric who is obligated "to keep those communications secret." The fact both parties to the original communication knew it likely would be transmitted to a third person vitiated ab initio any privilege under Evidence Code section 1032, or, alternatively, constituted a waiver of the privilege under Evidence Code section 912, subdivision (a).[14]

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[14] Under Evidence Code section 912, subdivision (a), the clergy-penitent privilege is waived if a holder of the privilege discloses a significant part of the communication or consents to such disclosure.

Under Evidence Code section 912, subdivision (d), "A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), *when disclosure is reasonably necessary for the accomplishment of the purpose* for which the lawyer, physician, psychotherapist, sexual assault counselor, or domestic violence counselor was consulted, *is not a waiver of the privilege.*" (Italics added.) *Notably, the clergy-penitent relationship is missing from the enumerated*

(Continued on following page)

Here, the record demonstrates the District Attorney met the burden of rebutting Evidence Code section 917's presumption of confidentiality by proving the priests were aware the communications were likely to be transmitted to third persons.

The Archdiocese argues these communications were not transmitted "to any third party, that is, someone outside of the bishop (or his alter ego, the Vicar for Clergy)." The contention is unavailing. We reject the argument that just because Cardinal Mahony considers the Vicar for Clergy his surrogate for dealing with troubled priests, there was no violation of Evidence Code section 1032's requirement that the communication be "made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who . . . has a duty to keep those communications secret."

With respect to the various documents here in issue, discussed *infra,* the referee held *none* was shielded by the clergy-penitent privilege. Guided by the principles set forth above, we uphold the referee's rulings in their entirety as follows.

Doe 1 # 16-17: This is a letter from Cardinal Mahony to a priest. The referee reasonably could conclude the three numbered subparagraphs of this letter did not constitute penitential communications because they merely notified the priest of certain administrative decisions made by the Archdiocese. In any event, the entire letter is not covered by the clergy-penitent privilege because it was not sufficiently confidential. Not only did

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relationships that benefit from this "reasonably necessary disclosure" rule.

the priest know such communications were likely to be shared with the Vicar for Clergy, but the letter itself announced a copy was being sent to the Vicar.

Doe 1 # 50-52: This document consists of a letter from a priest to the Vicar for Clergy, and a cover memorandum from the Vicar transmitting the priest's letter to Cardinal Mahony. The referee reasonably could conclude the letter was not within the clergy-penitent privilege because it merely discussed administrative actions taken by the Archdiocese, asked for legal information and suggested future job assignments. Furthermore, the letter was not sufficiently confidential to constitute a penitential communication because the priest knew it was likely to be shared with a third person. Further, the cover memorandum does not constitute a penitential communication because it does not contain any information transmitted to or from the priest.

Doe 1 # 80: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, reporting on a conversation with a priest. The referee reasonably could conclude this document did not constitute a penitential communication because it merely reported on the priest's cooperation with his therapists, strategized about possible legal problems and discussed church assignments. Moreover, the letter was not within the clergy-penitent privilege because it was not sufficiently confidential in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 1 # 397-400: This document consists of dated file notes containing summaries and verbatim excerpts from other subpoenaed documents:

The December 24, 1986, entry is a summary of Doe 1 # 16-17, which we have concluded does not fall within the clergy-penitent privilege. The same result applies to this summary of that document.

The June 22, 1987, entry is a summary of Doe 1 # 80, which we have concluded does not fall within the clergy-penitent privilege. The same result applies to this summary of that document.

Doe 2 # 13: This is a letter to Cardinal Mahony's predecessor from an official of the Archdiocese then responsible for ministering to troubled priests. The referee reasonably could conclude this document did not constitute a penitential communication because it merely related an event in the priest's personal history.

Doe 2 # 23: This is a memorandum to the file, written by the Vicar for Clergy, reporting on a third person's observation and evaluation of a priest's conduct in a particular situation. The referee reasonably could conclude this document did not constitute a penitential communication because it merely related an event in the priest's personal history.

Doe 2 # 31-32: This is a memorandum from the Vicar for Clergy to Cardinal Mahony. The Archdiocese is only objecting to two paragraphs of this document. The third paragraph merely repeats communications, contained in Doe 2 # 13 and Doe 2 # 23, which we have concluded do not fall within the clergy-penitent privilege. The same result applies to this summary of those documents. The referee reasonably could conclude the information contained in the seventh paragraph of the memorandum did not constitute a penitential communication because it merely related an incident in the priest's personal history.

In any event, the entire memorandum was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 2 # 34: This is a memorandum from a member of the Vicar for Clergy's staff to the Vicar for Clergy. A copy of the memorandum was transmitted to another member of the Vicar for Clergy's staff. The referee reasonably could conclude the document was not a penitential communication because it merely related incidents in the priest's personal history and offered an evaluation of the priest's situation. The document does not constitute a penitential communication because it does not contain any information transmitted to or from the priest. In any event, the memorandum was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 2 # 79: This is a letter from Cardinal Mahony to a priest, responding to a letter from the priest. A copy of Cardinal Mahony's letter was transmitted to the Vicar for Clergy. The letter was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 2 # 140: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, advising him of a conversation a member of the Vicar's staff had with a priest and the priest's psychotherapist. The referee reasonably could conclude this document did not constitute a penitential communication because it was merely a status report concerning the priest's progress in psychotherapy. In any

event, the document was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 2 # 172: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, discussing the establishment of an aftercare program for when a priest completes psychotherapy. The document was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person. The document does not constitute a penitential communication because it does not contain any information transmitted to or from the priest.

Doe 2 # 183: This is a letter from the Vicar for Clergy to a priest. The referee reasonably could conclude the document did not constitute a penitential communication because it was largely taken up with administrative matters and any penitential aspect was insignificant. Moreover, the document was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 2 # 278: This document consists of excerpts from three of the documents discussed above (Doe 2 # 140, # 172 & # 183), which we have concluded do not fall within the clergy-penitent privilege. The same result applies to these excerpts of those documents.

In sum, we conclude that none of the particular subpoenaed documents challenged by the Archdiocese falls within California's clergy-penitent privilege, and we affirm *all* of the referee's rulings in this regard.

3. *Application of psychotherapist-patient privilege to Archdiocese's claims regarding particular documents; the communication must be "reasonably necessary" to accomplish the purpose for which the psychotherapist was consulted.*

a. *Controlling statute: Evidence Code section 1012.*

California's psychotherapist-patient privilege provides that a "'confidential communication between patient and psychotherapist' means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, *or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted,* and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship." (Evid.Code, § 1012, italics added.)[15]

b. *Petitioners' theory why the psychotherapist-patient privilege is applicable to the disputed documents.*

Similar to their arguments for the application of the clergy-penitent privilege, petitioners assert that certain communications made in the context of the formation of

[15] With respect to the parties' respective burdens of proof and the standard of review, the discussion in the previous section, relating to the clergy-penitent privilege, is equally applicable here.

clergy process are privileged pursuant to the psychotherapist-patient privilege.

Petitioners acknowledge the statutory language requiring that information communicated in psychotherapy not be disclosed to third persons other than those necessary to further the interests of the patient in the consultation. They argue that disclosures to third parties were duly made as reasonably necessary to accomplish the purpose of the psychotherapy, namely, diagnosis and treatment of issues relating to celibacy and sexuality, and therefore remain confidential within the meaning of Evidence Code section 1012.

c. *Case law interpretation of Evidence Code section 1012; to remain privileged, disclosure to third persons must be in furtherance of the purpose for which the psychotherapist was consulted, namely, diagnosis and treatment of the patient.*

To reiterate, Evidence Code section 1012 defines a confidential communication between patient and psychotherapist as information transmitted between a patient and his or her psychotherapist in the course of that relationship, which information is disclosed "to no third persons other than those who are present to further the interest of the patient in the consultation, *or those to whom disclosure is reasonably necessary* for the transmission of the information or *the accomplishment of the purpose for which the psychotherapist is consulted,* and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship." (Italics added.)

The *purpose* for which a psychotherapist is consulted is set forth in Evidence Code section 1011, which defines "patient" as "a person who consults a psychotherapist or submits to an examination by a psychotherapist *for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition* or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems." (Italics added.)

There is ample case law illustrating disclosures to third persons which are "reasonably necessary" for the accomplishment of the *purpose* for which the psychotherapist was consulted. (Evid.Code, § 1012.)

In *Grosslight v. Superior Court* (1977) 72 Cal.App.3d 502, 140 Cal.Rptr. 278, the issue presented was whether the plaintiff in a personal injury action was entitled to discovery of a minor-defendant's psychiatric hospital records, on the theory the records might contain statements made by the minor's parents to the hospital staff indicating the parents had knowledge of the minor's propensities for violence. (*Id.* at p. 504, 140 Cal.Rptr. 278.)

Grosslight held such communications between parent and hospital were shielded by the psychotherapist-patient privilege because they were made "for the purpose of furthering the child's interest in communicating with the psychotherapist and . . . *to facilitate the diagnosis and treatment of the child.*" (*Id.* at p. 506, 140 Cal.Rptr. 278, italics added.) *Grosslight* reasoned "Although the [patient] at 16 or 17 is clearly old enough verbally to communicate with her doctors, the nature of her problem is psychiatric, and it is entirely possible that her psychiatric illness precludes objective, accurate and complete communication

by her with hospital personnel without the cooperation of her parents." (*Id.* at p. 507, 140 Cal.Rptr. 278.) Thus, any parental communication *to the hospital staff* in *Grosslight* would be privileged because it was made to assist in the diagnosis and treatment of the patient.

In *People v. Gomez* (1982) 134 Cal.App.3d 874, 185 Cal.Rptr. 155, the defendant contended that statements he made to students serving as interns with the family court services office were privileged. (*Id.* at p. 880, 185 Cal.Rptr. 155.) *Gomez* rejected that argument, noting the psychotherapist-patient privilege extended to virtually every licensed classification of "therapist" but did not apply to student interns. (*Id.* at pp. 880-881, 185 Cal.Rptr. 155; see Evid. Code, § 1010.)[16] *Gomez* went on to state, however, that under some circumstances, communications to student interns could be privileged if the students were working "*under the supervision of a licensee to whom the privilege does attach* [citation]." (*Id.* at p. 881, fn. 3, 185 Cal.Rptr. 155, italics added.)

In *Luhdorff v. Superior Court* (1985) 166 Cal.App.3d 485, 212 Cal.Rptr. 516, the prosecution sought access to written records relating to conversations between a defendant and a clinical social worker, one Gramajo. (*Id.* at p. 487, 212 Cal.Rptr. 516.) Gramajo was not a therapist to whom the privilege attached but "he worked under such a person generally, and [defendant's] case was ultimately *controlled and supervised by persons to whom the privilege attached.*" (*Id.* at p. 490, 212 Cal.Rptr. 516, italics added.) *Luhdorff* was guided by "[t]he language of [Evidence Code]

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[16] Evidence Code section 1010 defines persons who are phychotherapists for purposes of the psychotherapist-patient privilege.

section 1012 [which] plainly indicates that communications made by patients to persons *reasonably necessary to assist psychiatrists and psychologists in the treatment of the patient's mental disorder* come within the privilege." (*Id.* at p. 489, 212 Cal.Rptr. 516, italics added.) *Luhdorff* concluded "Gramajo clearly falls within the category of persons reasonably necessary for the transmission of information or the accomplishment of the purpose for which the psychotherapist is consulted." (*Id.* at p. 490, 212 Cal.Rptr. 516.)

In *Farrell L. v. Superior Court* (1988) 203 Cal.App.3d 521, 250 Cal.Rptr. 25, the question presented was "whether communications made by a patient to other persons participating in a group therapy session [conducted by a counselor at a state hospital] come within the psychotherapist-patient privilege." (*Id.* at p. 527, 250 Cal.Rptr. 25.)

Farrell L. reasoned "the other participants in a group therapy session are those who are present *to further the interest of the patient in the consultation . . . or the accomplishment of the purpose for which the psychotherapist is consulted* . . . . " (Evid.Code, § 1012.) The language of Evidence Code section 1012 plainly indicates that communications made by patients to persons who are present to further the interests of the patient come[] within the privilege. 'Group therapy' is designed to provide comfort and revelation to the patient who shares similar experiences and/or difficulties with other like persons within the group. The presence of each person is for the benefit of the others, including the witness/patient, and is designed to facilitate the patient's treatment. Communications such as these, when made in confidence, should not operate to

destroy the privilege." (*Farrell L., supra,* 203 Cal.App.3d at p. 527, 250 Cal.Rptr. 25, italics added.)

In *In re Pedro M.* (2000) 81 Cal.App.4th 550, 96 Cal.Rptr.2d 839, the juvenile court ordered a minor to "'[c]ooperate in a plan for psychiatric, psychological testing or treatment." (*Id.* at p. 553, 96 Cal.Rptr.2d 839.) The minor subsequently contended the juvenile court erroneously admitted the testimony of his therapist after he invoked the psychotherapist-patient privilege. (*Id.* at p. 554, 96 Cal.Rptr.2d 839.) *Pedro M.* concluded said privilege did not preclude the therapist from testifying at the adjudication of the supplemental petition concerning the minor's participation and progress in the court-ordered treatment plan. (*Id.* at p. 555, 96 Cal.Rptr.2d 839.)

Pedro M. explained "Evidence Code section 1012 itself permits disclosure of a confidential communication between patient and psychotherapist to *'those to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted . . . .'* In our view, this would include the juvenile court, where the patient is a delinquent minor who has been properly directed to participate and cooperate in a sex offender treatment program in conjunction with a disposition order placing the minor on probation." (*In re Pedro M., supra,* 81 Cal.App.4th at p. 554, 96 Cal.Rptr.2d 839, italics added.)

In re Mark L. (2001) 94 Cal.App.4th 573, 114 Cal.Rptr.2d 499 held "[t]he rationale of *In re Pedro M., supra,* 81 Cal.App.4th 550, 96 Cal.Rptr.2d 839, is applicable in the juvenile dependency context, in which therapy has a dual purpose – treatment of the child to ameliorate the effects of abuse or neglect and the disclosure of information

from which reasoned recommendations and decisions regarding the child's welfare can be made. As the Supreme Court has observed, '[w]ithout the testimony of psychologists, in many juvenile dependency and child custody cases superior courts and juvenile courts would have little or no evidence, and would be reduced to arbitrary decisions based upon the emotional response of the court.' (*In re Jasmon O.* (1994) 8 Cal.4th 398, 430 [33 Cal.Rptr.2d 85, 878 P.2d 1297].)" (*Id.* at p. 584, 33 Cal.Rptr.2d 85, 878 P.2d 1297.)

Most recently, in *In re Christopher M.* (2005) 127 Cal.App.4th 684, 26 Cal.Rptr.3d 61, the juvenile court placed the defendant on probation subject to numerous conditions, including conditions requiring that all records related to his medical and psychological treatment be made available upon request to the court and to the probation department. (*Id.* at pp. 687, 690, 26 Cal.Rptr.3d 61.) Defendant contended said conditions of probation violated the psychotherapist-patient privilege. (*Id.* at p. 695, 26 Cal.Rptr.3d 61.)

Christopher M. rejected the argument, explaining the express language of Evidence Code section 1012 "permits disclosure of otherwise privileged communications between patient and psychotherapist to third persons to whom disclosure is *reasonably necessary to accomplish the purpose* for which the psychotherapist is consulted." (*In re Christopher M., supra,* 127 Cal.App.4th at p. 696, 26 Cal.Rptr.3d 61, italics added.) *Christopher M.* observed "Here, by reasonably limiting disclosure of otherwise privileged psychotherapist-patient communications to the probation officer and the court, the court acted under the authority of Evidence Code section 1012 and avoided unnecessary disclosure of those communications." (*Ibid.*)

Additionally, we briefly look to case law relating to the physician-patient privilege, which is analogous to the psychotherapist-patient privilege.[17]

In *Rudnick v. Superior Court* (1974) 11 Cal.3d 924, 114 Cal.Rptr. 603, 523 P.2d 643, the plaintiff sued drug manufacturers for damages for injuries allegedly caused by a defective drug. (*Id.* at p. 927, 114 Cal.Rptr. 603, 523 P.2d 643.) Defendants refused to produce their records containing adverse drug reaction reports on the ground that such reports constituted confidential communications by various physicians and that their production would be violative of the physician-patient privilege. (*Ibid.*)

Rudnick explained "The 'disclosure in confidence [by the physician] of a communication that is protected by [the] (physician-patient privilege) . . . *when such disclosure is reasonably necessary for the accomplishment of the purpose for which the* . . . physician . . . was consulted, is not a waiver of the privilege.' [Citation.] Thus, for example, if the physician reported to defendants the adverse effects of the drug on his patient so as to obtain assistance in the use of the drug in treating the patient, such disclosure even if consented to by the patient would not constitute a waiver of

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[17] Evidence Code section 992 provides: "As used in this article, confidential communication between patient and physician means information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is *reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted,* and includes a diagnosis made and the advice given by the physician in the course of that relationship." (Italics added.)

the privilege." (*Rudnick v. Superior Court, supra,* 11 Cal.3d at pp. 930-931, 114 Cal.Rptr. 603, 523 P.2d 643, italics added.)

In *Blue Cross v. Superior Court* (1976) 61 Cal.App.3d 798, 132 Cal.Rptr. 635, the trial court entered a discovery order directing a prepaid health care plan to furnish plaintiff with information relating to other Blue Cross subscribers who had filed claims for psoriasis treatment. (*Id.* at pp. 799-800, 132 Cal.Rptr. 635.) The reviewing court ordered issuance of a peremptory writ of mandate directing the trial court to vacate its discovery order. It explained "All parties agree that the patients' names and ailments were disclosed to Blue Cross for the purpose of paying the doctor's fees. Disclosure, then, was '*reasonably necessary for . . . the accomplishment of the purpose for which the physician [was] consulted;* confidentiality was not lost and the privilege not waived." (*Id.* at pp. 801-802, 132 Cal.Rptr. 635, italics added.)

Guided by these authorities, we review the trial court's determination as to the applicability of the psychotherapist-patient privilege to the challenged documents.

d. *Application of Evidence Code section 1012 to Archdiocese's claims regarding particular documents.*

With respect to the various documents here in issue, discussed *infra,* the referee held *none* was shielded by the psychotherapist-patient privilege. Pursuant to the principles set forth above, we uphold the referee's rulings, with one exception.

Doe 1 # 50-52: This document consists of a letter from a priest to the Vicar for Clergy, and a cover memorandum

from the Vicar transmitting the letter to Cardinal Mahony. The Archdiocese only claims that the cover memorandum, which recites a psychotherapist's recommendation about the priest taking a trip abroad, is protected by the psychotherapist-patient privilege. However, the referee reasonably could conclude the transmission of this information to the Archdiocese did not come within the "furtherance of the purpose" rule of Evidence Code section 1012, because any connection to furthering the priest's treatment was too attenuated. Moreover, neither party to this communication was a psychotherapist or someone being supervised by a treating psychotherapist.

Doe 1 # 74: This is a memorandum to the file, by the Vicar for Clergy, reporting on treatment recommendations transmitted by a priest's psychotherapists. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because the Vicar was not involved in rendering psychotherapy to the priest, nor was he being supervised by a treating psychotherapist.

Doe 1 # 80: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, reporting on a conversation the Vicar had with a priest regarding psychotherapy recommendations and future work assignments for the priest. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because neither party to this communication was a psychotherapist or someone being supervised by a treating psychotherapist.

Doe 1 # 397-400: This document consists of dated file notes containing summaries and verbatim excerpts from other subpoenaed documents:

The January 9, 1987, entry is essentially a copy of a psychotherapeutic report prepared by a priest's therapists. The report contains a detailed psycho-sexual history and diagnosis. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because no person at the Archdiocese was involved in rendering psychotherapy to the priest, or was being supervised by a treating psychotherapist.

The June 22, 1987, entry is a summary of Doe 1 # 80, which we have concluded must be produced to the grand jury. The same result applies to this summary of that document.

The September 6, 1996, entry is essentially a copy of a psychotherapeutic evaluation sent by a priest's therapists to a member of the Vicar for Clergy's staff. This evaluation contains both a diagnosis and treatment recommendations. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because the Vicar for Clergy's staff was not involved in rendering psychotherapy to the priest, nor was that staff being supervised by a treating psychotherapist.

The March 5, 1999, entry is essentially a copy of a file note prepared by a member of the Vicar for Clergy's staff, reporting on a discussion he had with a priest. The document describes the priest's self-report concerning his level of functioning, his progress in therapy and his desires concerning future work assignments. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because it does not convey any significant psychological information. Moreover, the Vicar for Clergy's staff was not involved in rendering

psychotherapy to the priest, nor was it being supervised by a treating psychotherapist.

Doe 2 # 46: This is the sole item as to which we overturn the referee's ruling because the "claimed privilege appears as a matter of law from the undisputed facts." (*HLC Properties, Limited v. Superior Court, supra,* 35 Cal.4th at p. 60, 24 Cal.Rptr.3d 199, 105 P.3d 560.) This document is a memorandum from a member of the Vicar for Clergy's staff to a priest's psychotherapists. Said memorandum supplied the therapeutic team with information about a troubled priest's personal history as an aid to diagnosis and treatment. The record reflects such background information was routinely provided to assist the psychotherapists in diagnosing and treating the priests. Under the reasoning of *Grosslight v. Superior Court, supra,* 72 Cal.App.3d at pp. 506-507, 140 Cal.Rptr. 278, we conclude this document is appropriately shielded by the psychotherapist-patient privilege because it was a disclosure reasonably necessary to accomplish the purpose for which the psychotherapist was consulted, namely, diagnosis and treatment of the patient. (Evid.Code, § 1012.) The inclusion of such material within the purview of the privilege "encourages full disclosure of pertinent matters that otherwise might be withheld by [third persons] to the detriment of the patient." (*Grosslight, supra,* 72 Cal.App.3d at p. 507, 140 Cal.Rptr. 278.) Therefore, we overrule the referee's order that this particular document be produced.

Doe 2 # 140: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, advising him of a conversation a member of the Vicar's staff had with a priest and the priest's psychotherapist. Although the document is ostensibly a status report on the priest's progress in therapy,

the referee reasonably could conclude it was not covered by the psychotherapist-patient privilege because it did not contain any significant psychological information. Moreover, this communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because neither party to this communication was a psychotherapist or someone being supervised by a treating psychotherapist.

Doe 2 # 172: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, discussing possible aftercare programs for a priest when he completes psychotherapy. The referee reasonably could conclude it was not covered by the psychotherapist-patient privilege because it did not contain any significant psychological information. Moreover, this communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because neither party to this communication was a psychotherapist or someone being supervised by a treating psychotherapist.

Doe 2 # 278: This document consists of dated file notes containing excerpts from two of the documents discussed above. We have concluded that neither Doe 2 # 140 nor Doe 2 # 172 falls within the psychotherapist-patient privilege. The same result applies to these excerpts of those two documents.

In sum, we conclude that, *except for Doe 2 # 46,* none of the particular subpoenaed documents challenged by the Archdiocese falls within California's psychotherapist-patient privilege, and we affirm all of the referee's rulings in this regard. We order that Doe 2 # 46 not be turned over [sic] the grand jury.

4. *Attorney-client and attorney work product privileges are inapplicable.*

The Archdiocese contends some of the disputed documents should not be disclosed to the grand jury because they are protected either by the attorney-client privilege or by the attorney work product privilege. This claim is without merit.

Noting the referee concluded "the communications at issue [had] been made for multiple purposes," the Archdiocese argues that if any of the disputed documents were generated by "investigations of crime or communications to ascertain the validity of charges, as Respondent court asserts, then they should be protected by the Work Product Doctrine and/or the Lawyer-Client Privilege in addition to the First Amendment and Clergy Privilege."

However, the Archdiocese is confusing two different issues: (1) the referee's conclusion, in connection with his general ruling on the First Amendment and clergy-penitent privilege claims, that the Archdiocese had mixed motives for intervening with priests accused of sexual misconduct, and (2) the referee's rulings on the individual documents at issue in this writ proceeding. None of the remaining disputed documents falls within either the attorney-client or the attorney work product privileges.

Under Evidence Code section 952, the attorney-client privilege protects "information transmitted between a client and his or her lawyer in the course of that relationship . . . and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." "'In California the [attorney-client] privilege has been held to encompass not only oral or written statements, but additionally actions, signs, or other means of

communicating information. . . . '" (*Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 457, 107 Cal.Rptr.2d 456.) Under Code of Civil Procedure section 2018, subdivision (c), "[a]ny writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances."

The Archdiocese's attorney is referred to only twice in the 15 documents that remain in dispute. Doe 2 # 31 refers to particular advice given by the attorney to the Vicar for Clergy, but this reference appears in one of the paragraphs of Doe 2 # 31 that is *not* being disputed by the Archdiocese. In Doe 1 # 50, the Vicar for Clergy refers to the attorney, but only to mention counsel's presence at a meeting during which Cardinal Mahony made a particular statement. There is no indication Cardinal Mahony's statement reflects any of the attorney's thought processes.

There is no indication any of the 15 disputed documents constitutes information transmitted between the Archdiocese and its lawyer.

Hence, none of the disputed documents falls within either the attorney-client or the attorney work product privilege.

5. *The Stogner decision does not invalidate the subpoenas.*

In 1993 the Legislature enacted Penal Code section 803, subdivision (g), in order to expand the statute of limitations in child molestation cases. *Stogner v. California, supra*, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544, held this statute violated the ex post facto clause when used to revive prosecutions already time-barred before the statute was enacted. The Priests contend the grand jury

subpoenas duces tecum violate the principles of *Stogner* because the subpoenas encompass documents that are irrelevant to crimes allegedly occurring after January 1988, and because, properly understood, *Stogner* prohibits prosecution of any child molestation crime committed before January 1, 1994.[18] These claims are without merit.

The first claim fails because admissible 'other crimes' evidence is not restricted by the statute of limitations. (See Evid.Code, §§ 1101, subd. (b), & 1108.)[19] As the Priests themselves acknowledge, "neither Evidence Code section 1101(b) nor 1108 is a chargeable offense. They are merely rules of admissibility for evidence at trial."

The second claim is unavailing because it misconstrues *Stogner,* which stated "[W]e agree that the State's interest in prosecuting child abuse cases is an important one. But there is also a predominating constitutional interest in forbidding the State to revive a long-forbidden prosecution. And *to hold that such a law is ex post facto does not prevent the State from extending time limits* for the prosecution of future offenses, or *for prosecutions not yet time barred.*" (*Stogner v. California, supra,* 539 U.S.

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[18] Penal Code section 803, subdivision (g), came into effect on January 1, 1994. The statute of limitations for child molestation cases is six years (Pen.Code, §§ 800, 805, subd. (a)).

[19] Under Evidence Code section 1101, subdivision (b), "evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 401-402, 27 Cal.Rptr.2d 646, 867 P.2d 757.) Evidence Code section 1108 provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible [by the rule excluding propensity evidence]."

607 at p. 633, 123 S.Ct. 2446, 156 L.Ed.2d 544, italics added.)

Hence, the Priests' argument already has been firmly rejected by a number of courts which have recognized the difference between extension statutes and revival statutes. (See *People v. Terry* (2005) 127 Cal.App.4th 750, 775, 26 Cal.Rptr.3d 71 ["As *Stogner* indicates, extensions of existing, unexpired limitations periods are not ex post facto because such extensions do not resurrect otherwise time barred prosecutions."]; accord *People v. Vasquez* (2004) 118 Cal.App.4th 501, 13 Cal.Rptr.3d 162; *People v. Superior Court (German)* (2004) 116 Cal.App.4th 1192, 10 Cal.Rptr.3d 893; *People v. Renderos* (2003) 114 Cal.App.4th 961, 8 Cal.Rptr.3d 163; *People v. Robertson* (2003) 113 Cal.App.4th 389, 6 Cal.Rptr.3d 363).

6. *No showing District Attorney impermissibly usurped grand jury authority.*

The Priests contend none of the subpoenaed documents may be disclosed because the District Attorney improperly usurped the grand jury's authority. This claim also is without merit.

The Priests assert the District Attorney openly declared he was using the grand jury to conduct "private" discovery for his own purposes that had nothing to do with any pending grand jury investigation, and that the referee improperly acquiesced in this manipulation of the grand jury process. We cannot agree.

This claim is based on a misreading of the District Attorney's oral argument to the referee and a misperception about the proper scope of a grand jury investigation,

which "'"is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning."'" (*M.B. v. Superior Court, supra,* 103 Cal.App.4th at pp. 1394-1395, 127 Cal.Rptr.2d 454.)

Contrary to the Priests' assertion the District Attorney was allowed to subvert the grand jury process, the record shows the referee rejected the District Attorney's argument he should be allowed to present, at the pre-indictment stage of a grand jury proceeding, evidence that would be inadmissible at trial.

The Priests complain that, although the District Attorney "may be present to advise the grand jury and conduct examination of witnesses for the grand jury, . . . he may not take the evidence he is exposed to in that capacity to use for other purposes outside the grand jury." But the Priests point to no evidence indicating such a thing happened here. They merely argue it can be *inferred* from the District Attorney's oral argument to the referee that the District Attorney *believed* he could do this. We do not agree with the Priests' interpretation of the District Attorney's comments. In any event, something more than bad thoughts would have to be demonstrated to sustain this claim.

7. *Subpoenas were not impermissibly vague.*

The Priests contend the subpoenas were defective because they were overbroad as to time, place and conduct,

and imprecise in their description of the items to be produced. Again, these claims are without merit.

Although "[t]he Fourth Amendment requires search warrants to state with reasonable particularity what items are being targeted for search," in order to prevent police from rummaging through someone's belongings, a search warrant "need only be reasonably specific, rather than elaborately detailed, and the specificity required varies depending on the circumstances of the case and the type of items involved.' [Citation.]" (*U.S. v. Bridges* (9th Cir.2003) 344 F.3d 1010, 1016-1017.)

The subpoenas here requested "[a]ll documents and other materials that are in the possession, custody, or control of the Archdiocese of Los Angeles that relate in any way to allegations of child molestation or sexual abuse committed by Father. . . . [¶] The subpoenaed documents and other materials *include, but are not limited to,* documents in the Archdiocese general archives, general files, secret archives, secret files,. . . . " (Italics added.)

The Priests contend the subpoenas amounted to unconstitutional general warrants because their descriptions of the items to be produced were impermissibly vague. They argue that the "include, but are not limited to" language is precisely the kind of overbroad language found to have invalidated a search warrant in *U.S. v. Bridges, supra.* But a crucial defect in *Bridges* was that the search warrant nowhere stated what criminal activity was being investigated. "In light of the expansive and open-ended language used in the search warrant to describe its purpose and scope, *we hold that this warrant's failure to specify what criminal activity was being investigated,* or suspected of having been perpetrated, *renders its*

legitimacy constitutionally defective." (*U.S. v. Bridges, supra,* 344 F.3d at p. 1016.) There is no such problem in this case.

The Priests contend the subpoenas were impermissibly overbroad as to time because they effectively asked for every personnel document since the Priests had been incardinated in the Archdiocese. As we pointed out above, however, the admissibility of other crimes evidence under Evidence Code sections 1101 and 1108 means relevant evidence could be discovered by such requests.

As to place, the Priests complain the subpoenas are not limited to crimes committed in Los Angeles County in compliance with Penal Code section 917, which provides "[t]he grand jury may inquire into all public offenses committed or triable within the county. . . . " However, as the District Attorney points out, Penal Code section 784.7, subdivision (a), allows a sex crime committed outside Los Angeles County to be joined with a Los Angeles County sex crime, and then for the entire case to be prosecuted in Los Angeles County.[20] (See *People v. Betts* (2005) 34 Cal.4th 1039, 1059, 23 Cal.Rptr.3d 138, 103 P.3d 883 [section 784.7 "expands venue for specified offenses to permit crimes . . . that occurred in different counties to be tried in the same county"].)

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[20] Penal Code section 784.7, subdivision (a), provides, in pertinent part: "When more than one violation of Section 220, except assault with intent to commit mayhem, 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 occurs in more than one jurisdictional territory, the jurisdiction of any of those offenses, and for any offenses properly joinable with that offense, is in any jurisdiction where at least one of the offenses occurred, subject to a hearing, pursuant to Section 954, within the jurisdiction of the proposed trial."

As to conduct, the Priests contend "The term 'sexual abuse' is so vague and broad that a reasonable Custodian of Records might feel obliged to produce information pertaining to sexual conduct that is not criminal at all, such as verbal sexual harassment, [or] consensual sexual activity with an adult – one person's bawdy joke may be another person's 'sexual abuse.' Indeed, in the context of the Catholic clergy ... even masturbation and sexual thoughts may be deemed to be sinful and abusive." However, there is no indication whatsoever the subpoenas were read in such a broad manner. Had they been, objections could have been made.

Moreover, this claim is based on a reading of the phrase "evidence of child molestation and sexual abuse" in which the word "child" does not modify "sexual abuse." This is not the only, or even the most natural, interpretation.

8. *Several grand jury issues already have been decided in prior appellate proceeding.*

The Priests raise several grand jury issues that were decided in our earlier opinion in this matter. They claim the grand jury did not have the power to issue subpoenas duces tecum and, if it did, these subpoenas were defective because they were unaccompanied by a good faith affidavit. These issues were decided in *M.B. v. Superior Court, supra,* 103 Cal.App.4th 1384, 127 Cal.Rptr.2d 454, and it is unnecessary to revisit them here.

9. *Priests' claims regarding particular documents are insufficiently presented and will not be addressed.*

The Priests contend some of the subpoenaed documents cannot be disclosed without violating the hearsay rule, the confidentiality of third persons named in the subpoenaed documents, the right of privacy, and the attorney-client, attorney work product, psychotherapist-patient, and clergy-penitent privileges. As to all of these claims, however, the Priests have failed entirely to specify which documents they are challenging. Their pleadings merely refer to "some of these records" and similarly vague characterizations.[21] This does not constitute adequate briefing. (Cf. *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99, 31 Cal.Rptr.2d 264 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived."].)

Nor have the Priests furnished this court with copies of any disputed documents. Hence, even assuming a privilege existed theoretically, we would be unable to determine that any particular subpoenaed document was in fact privileged. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296, 240 Cal.Rptr. 872, 743 P.2d 932 [failure to furnish adequate record on appeal mandates adverse ruling]; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502, 93 Cal.Rptr.2d 97 [failure

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[21] For instance, regarding the psychotherapist-patient privilege, the Priests contend that "[*w*]ithin some of the files the Archdiocese intends to produce . . . are extremely private and intimate communications." (Italics added.) With regard to the clergy-penitent privilege, the Priests contend: "*Some of the items* within the command of the subpoenas include statements that are protected by this privilege. . . ." (Italics added.)

to provide adequate record on appeal triggers adverse ruling because appealed judgments are presumed correct].)

"A defendant seeking review of a ruling of the trial court by means of a petition for extraordinary writ must provide the appellate court with a record sufficient to permit such review. [Citations.]" (*Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186, 154 Cal.Rptr. 917, 593 P.2d 862.) Because the Priests have failed to do so in this case, we decline to address their separate claims.

DISPOSITION

The order to show cause is discharged. The Archdiocese's objection to Doe 2 # 46 is sustained; this document will not be turned over to the grand jury. In all other respects, the petitions for writ of mandate, prohibition, or other appropriate relief are denied. All parties to bear their own costs in this proceeding. (Cal. Rules of Court, rule 56(*l*)(2).) The stay order is vacated.

CROSKEY and KITCHING, JJ., concur.

Court of A[illegible]l, Second Appellate District,
Division Three – Nos. B177852/B180696
S136932

IN THE SUPREME COURT OF CALIFORNIA

En Banc
(Filed Nov. 16, 2005)

THE ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES, Petitioner,

v.

LOS ANGELES COUNTY SUPERIOR COURT, Respondent;

THE PEOPLE, Real Party in Interest.

And Related Case.

Petitions for review DENIED.

GEORGE
Chief Justice

103 Cal.App.4th 1384

M. B. et al., Petitioners,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.
No. B160315.
Court of Appeal, Second District, Division 3, California.
Dec. 2, 2002.

SUMMARY

A criminal grand jury was convened to investigate allegations of child molestation against three priests. The trial court denied the priests' motion to quash grand jury subpoenas for all documents, including confidential personnel files, in the possession of the archdiocese relating to allegations of sexual abuse against any of them. (Superior Court of Los Angeles County, No. BH001298, Dan T. Oki, Judge.)

COUNSEL

Guzin & Steier and Donald H. Steier for Petitioners.

No appearance for Respondent.

Steve Cooley, District Attorney, George M. Palmer and Fred Klink, Deputy District Attorneys, for Real Party in Interest.

KLEIN, P.J.

The petition for writ of mandate raises two issues of first impression: whether a California criminal grand jury has the power to issue a subpoena duces tecum; and if it does, whether such a subpoena is defective if it is served

without the good cause affidavit required by Code of Civil Procedure sections 1985 and 1987.5.

We conclude California criminal grand juries have the power to issue subpoenas duces tecum, and that such subpoenas do not require good cause affidavits.

Background

This proceeding arises out of a grand jury investigation into allegations that petitioners M.B., D.G. and M.W.,[1] three Roman Catholic priests employed by the Los Angeles Archdiocese, committed acts of child molestation.

On June 12, 2002, the Los Angeles County District Attorney served grand jury subpoenas on the Archdiocese's custodian of records, seeking all documents in the Archdiocese's possession or control – including "confidential personnel files" – that "relate in any way to allegations of child molestation or sexual abuse" by any of the petitioners.[2] The Archdiocese produced the requested documents,

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[1] We use these initials because the superior court sealed the records in this case to protect petitioners' confidentiality.

[2] The district attorney issued three criminal grand jury subpoenas, each one requested "[a]ll documents and other materials that are in the possession, custody, or control of the Archdiocese of Los Angeles that relate in any way to allegations of child molestation or sexual abuse committed by Father _____," including "documents in the Archdiocese general archives, general files, secret archives, secret files, sub secreto files or archives, personnel files, confidential personnel files, locked files, and investigative files as well as memoranda, correspondence, reports, evaluations, interviews, statements, notes, contracts, agreements, settlement agreements, confidentiality agreements, and records of payment relating in any way to allegations of child molestation and sexual abuse committed by Father _____."

which the trial court sealed because the petitioners immediately moved to quash the subpoenas.

On July 15, 2002, following extensive briefing, an in camera inspection of certain grand jury proceedings,[3] and oral argument, the trial court concluded petitioners had standing to attack the subpoenas for facial defects, but that the subpoenas were not defective for failing to meet the affidavit requirements set forth in Code of Civil Procedure section 1985, subdivision (b) (affidavit shall be served with subpoena duces tecum showing good cause and materiality) and 1987.5 (service of subpoena duces tecum is invalid without affidavit).[4]

On July 29, 2002, petitioners sought a writ of mandate from this court vacating the superior court's order denying their motion to quash and declaring that the subpoenas must be quashed as facially defective. Upon receipt of the petition for writ of mandate, we issued an order to show cause and stayed the trial court's order denying petitioners' motion to quash.

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[3] The trial court stated: "I have also at the request of the People read and considered a transcript of the grand jury proceedings that occurred on June 12th, 2002 which consisted essentially of an opening statement to the grand jury by Mr. Hodgeman [*sic*] outlining the People's theory of the investigation as well as the preliminary testimony of three sheriff's investigators involved in this investigation. And I did find that necessary to do in order to determine the relevancy of the items that are sought by the subpoena duces tecum that are in issue today."

[4] Although a number of other issues also were considered at this hearing (e.g., whether the subpoenas were overbroad or asked for information in violation of the attorney-client or patient-therapist privileges), none of them is raised in the present writ petition; those issues have been preserved pending resolution of this petition.

Discussion

1. *Grand jury had power to issue subpoenas duces tecum.*

a. *Common law supports the power.*

"The institution of the grand jury is deeply rooted in Anglo American history. In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action." (*United States v. Calandra* (1974) 414 U.S. 338, 342-343 [94 S.Ct. 613, 617, 38 L.Ed.2d 561], fn. omitted.) "Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." (*Id.* at p. 343 [94 S.Ct. at p. 617].)

(*1a*) One of the grand jury's traditional powers is the ability to compel production of documentary evidence by issuing subpoenas duces tecum. In *Wilson v. United States* (1911) 221 U.S. 361 [31 S.Ct. 538, 55 L.Ed. 771], a company president claimed that a grand jury subpoena for corporate books in his possession "was unauthorized, and hence void, because it was not directed to an individual, but to a corporation." (*Id.* at p. 372 [31 S.Ct. at p. 541].) *Wilson* held the grand jury subpoena was valid, reasoning: "The power to compel the production of documents is, of course, not limited to those cases where it is sought merely to supplement or aid the testimony of the person required

to produce them. The production may be enforced independently of his testimony, and it was held long since that the writ of subpoena *duces tecum* was adequate for this purpose. As was said by Lord Ellenborough in *Amey v. Long*, 9 East, 484, 'The right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a Court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them.'" (*Ibid.*)

Despite this compelling common law history, petitioners contend the grand jury in this case had no power to issue a subpoena duces tecum because Penal Code[5] section 939.2[6] – the grand jury statute discussing subpoenas – refers only to requiring the attendance of witnesses, and says nothing about calling for the production of documents. Petitioners argue: "The Grand Jury in California is entirely a creation of the Legislature. Its only powers are those specifically granted to it in statute by the Legislature. It has no inherent powers," and "Without a specific grant of power from the Legislature, the Grand Jury

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[5] All further statutory references are to the Penal Code unless otherwise specified.

[6] Section 939.2 provides: "A subpoena requiring the attendance of a witness before the grand jury may be signed and issued by the district attorney, his investigator or, upon request of the grand jury, by any judge of the superior court, for witnesses in the state, in support of the prosecution, for those witnesses whose testimony, in his opinion is material in an investigation before the grand jury, and for such other witnesses as the grand jury, upon an investigation pending before them, may direct."

Section 923, subdivision (a), allows the Attorney General to convene a grand jury and "issue subpoenas . . . to the same extent as the district attorney may do."

cannot compel production of documents. Penal Code section 939.2 *excludes* that power."

Petitioners are wrong. Not only is there statutory warrant for grand jury subpoenas duces tecum, but our Supreme Court has emphatically "rejected the contention that the California grand jury [is] a 'purely' statutory body, wholly distinct from its common law predecessor." (*People v. Superior Court (1973 Grand Jury)* (1975) 13 Cal.3d 430, 440, fn. 11 [119 Cal.Rptr. 193, 531 P.2d 761].)

In *Fitts v. Superior Court* (1936) 6 Cal.2d 230 [57 P.2d 510], the Supreme Court was faced with deciding the validity of a grand jury accusation, seeking under former section 758 to remove a district attorney for misconduct in office, that had been approved by only 11 grand jurors. *Fitts* noted section 758 was "silent as to the number of jurors who must concur in order to return a valid accusation. No other section of the code, nor does any statute of this state, fix the number of grand jurors who must concur in order to return an accusation. It is contended by respondent [superior] court that under such circumstances the general provisions of section 7, subdivision 17 of the Penal Code are applicable which provide that 'Words giving a joint authority to three or more public officers, or other persons, are construed as giving authority to a majority of them, unless it be otherwise expressed in the act giving authority.'" (*Fitts v. Superior Court, supra,* at p. 235.) The district attorney urged the court to look to the common law rule requiring the concurrence of at least 12 grand jurors. In reply, the superior court "argue[d] that our grand jury is not the one known to the common law, but is a statutory body. . . ." (*Id.* at p. 233.)

To resolve this issue, *Fitts* first examined the common law tradition, citing Blackstone, Edward Coke and other authorities, from which it concluded "that under the common law the grand jury could only act upon the concurrence or agreement of twelve of their number." (*Fitts v. Superior Court, supra,* 6 Cal.2d at p. 240.) *Fitts* then applied this rule to section 758, reasoning that the California grand jury is *not* a purely statutory creation. "The members of the first constitutional convention in providing for a grand jury must have had in mind the grand jury as known to the common law. This the respondents admit, but further contend that the constitutional convention of 1879 adopted an entirely different system than the common law system provided for in the Constitution of 1849. We find nothing to justify this conclusion. . . . The Constitution of 1879 did not attempt to change the historic character of the grand jury, and the system its members had in mind was evidently the same system that had come down to them from the common law. It is in no sense a statutory grand jury as distinguished from the common-law grand jury as claimed by the respondents. . . . We must conclude, therefore, that the Constitution of 1879 when it refers to the grand jury refers to it as it had always been known and understood prior thereto." (*Fitts v. Superior Court, supra,* at pp. 240-241.)

As the Supreme Court pointed out almost 40 years later, "*Fitts* . . . establishes the propriety of considering common law principles as supplementary to the applicable California statutes relating to grand juries." (*People v.*

Superior Court (1973 Grand Jury), supra, 13 Cal.3d at p. 440, fn. 11.)[7]

b. *California statutory law also supportive.*

In addition to this authority rooted in the common law, California statutory law also authorizes the use of subpoenas duces tecum in grand jury investigations. As originally enacted in 1872, subdivision (2) of section 1326 allowed a district attorney to issue a subpoena "'for such . . . witnesses as the Grand Jury, upon an investigation pending before them, may direct.'" In 1937, subdivision (2) was amended to read, "'for those witnesses whose testimony, in [the district attorney's] opinion, is material in an investigation before the grand jury[, and for such other witnesses as the grand jury, upon an investigation pending before them, may direct].'" (*See* Historical Note, 51 West's Ann. Pen. Code (1982 ed.) foll. § 1326, pp. 791-792.)

During all this time, section 1327, which set out the appropriate form of the subpoena authorized by section 1326, provided that "[i]f books, papers, or documents are required, a direction to the following effect must be contained in the

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[7] This conclusion is not undermined by *Allen v. Payne* (1934) 1 Cal.2d 607, 36 P.2d 614, cited by petitioners, which held the grand jury did not have the power to employ and compensate people to investigate crime. *Allen* found no need to rely on inherent or implied powers in that situation because the grand jury had been given express statutory authority to employ certain other people – e.g., interpreters, auditors and stenographic reporters – and "[i]t seems clear from these instances that the legislature has considered the employment of persons by the grand jury a matter to be governed by statute. In none of these cases would there have been any necessity for a grant of authority if there existed the implied power which is claimed for the body by petitioner." (*Id.* at pp. 608-609.)

subpoena: 'And you are required, also, to bring with you the following' (describing intelligibly the books, papers, or documents required)."

Case law during this time also reflects a presumption that sections 1326 and 1327 controlled the issuance of grand jury subpoenas. (*See, e.g., Samish v. Superior Court* (1938) 28 Cal.App.2d 685, 692-693 [83 P.2d 305] [grand jury could issue subpoena duces tecum to compel production of income tax statements]; *In re Peart* (1935) 5 Cal.App.2d 469, 472-474 [43 P.2d 334] [district attorney's subpoena authority under section 1326 did not include issuing subpoena in absence of grand jury's direction to do so]; *Woody v. Peairs* (1917) 35 Cal.App. 553, 556-557 [170 P. 660] [section 1326 gave district attorney authority to subpoena witnesses to appear before grand jury].)

As part of a major recodification of the grand jury statutes in 1959, the Legislature deleted subdivision (2) of section 1326, replaced it with a new version that said nothing about grand jury investigations,[8] and enacted

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[8] Section 1326 now provides: "The process by which the attendance of a witness before a court or magistrate is required is a subpoena. It may be signed and issued by any of the following: [¶] (1) A magistrate before whom a complaint is laid or his clerk, the district attorney or his investigator, or the public defender or his investigator, for witnesses in the state. [¶] (2) The district attorney, his investigator, or, upon request of the grand jury, any judge of the superior court, for witnesses in the state, in support of an indictment or information, to appear before the court in which it is to be tried. [¶] (3) The district attorney or his investigator, the public defender or his investigator, the clerk of the court in which a criminal action is to be tried, or, if there is no clerk, the judge of the court. The clerk or judge shall, at any time, upon application of the defendant, and without charge, issue as many blank subpoenas, subscribed by him, for witnesses in the state, as the defendant may require. [¶] (4) The attorney of record for the defendant."

section 939.2, which specifically addresses the issuance of grand jury subpoenas, but only discusses witnesses and says nothing about documents. However, the 1959 recodification act expressly declared that it intended to make no substantive change in the law. "In enacting this act, the Legislature intends to recodify the laws relating to grand juries for the purpose of collecting such laws under one title of the Penal Code and of providing a more logical arrangement of such laws. *It is not the intent of the Legislature to make any substantive change in the laws affected by this act.* The sections of law added or amended by this act insofar as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations and not as new enactments." (Stats. 1959, ch. 501, § 20, p. 2458, italics added.)

It seems apparent the Legislature intended to leave the pre-1959 practice intact and, therefore, that section 939.2 encompasses the authority formerly contained in sections 1326 and 1327 allowing subpoenas duces tecum in grand jury proceedings.

Hence, we conclude California grand juries do indeed have the power, stemming from both common law tradition and statutory enactment, to issue subpoenas duces tecum.

2. *Grand jury's subpoenas duces tecum do not require good cause affidavits.*

Petitioners' alternative contention is that even if the grand jury had the power to issue a subpoena duces tecum, the ones issued in this case were defective because

they lacked the good cause affidavits required by Code of Civil Procedure section 1985.

a. *Standing issue not reached because writ petition will be denied on the merits.*

Initially, we must address the People's contention that petitioners lack standing to make a facial attack on the grand jury subpoenas. We are not persuaded by the People's argument and, in any event, we need not reach a definitive conclusion because we will hold that petitioners' facial attack is meritless.

At the hearing on the motion to quash, the trial court said: "Procedurally whether the petitioners have standing to attack procedural defects . . . in the subpoenas, the law is not as clear to me in that regard. But my inclination is to rule that they do have standing." Petitioners assert "[t]he law is clear that a subpoena may be quashed when it is defective, will breach established privileges, or violates constitutionally protected interests."

The People argue petitioners lack standing because they do not have any proprietary interest in the subpoenaed documents: "[T]he records are not the Petitioners' property. They are the property of the Roman Catholic Archbishop of Los Angeles, a corporation sole, and they have been turned over to the court in obedience to the grand jury subpoenas without any legal objections or motions to quash those subpoenas being made by the owner or custodian of those records." While conceding petitioners do have legitimate privilege claims to assert, the People contend petitioners have no right to quashal on the procedural ground that the subpoenas lacked good cause affidavits.

(*2*) "[T]he custodian of materials protected by an evidentiary privilege owes a duty to the holder of the privilege to claim the privilege and to take actions necessary to ensure that the materials are not disclosed improperly. [Citations.]" (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 713 [107 Cal.Rptr.2d 323, 23 P.3d 563].) Third party intervention for the purpose of filing a motion to quash is generally permitted so that evidentiary privileges are not sacrificed just because the subpoena recipient lacks sufficient self-interest to object.

"[T]he Supreme Court and other federal courts have permitted third parties to move to quash grand jury subpoenas directed to another person where a litigant has sufficiently important, legally-cognizable interests in the materials or testimony sought to give the litigant standing to challenge the validity of that subpoena. *See, e.g., Gravel v. United States,* 408 U.S. 606, [92 S.Ct. 2614, 33 L.Ed.2d 583] (1972) (U.S. Senator asserting constitutional privilege allowed to intervene and move to quash subpoena directed at his assistant)." (*U.S. v. Johnson* (2000) 53 M.J. 459, 461; *see In re Grand Jury Proceedings in Matter of Freeman* (11th Cir. 1983) 708 F.2d 1571, 1574-1575 [grand jury targets may intervene to assert attorney-client privilege as to subpoenaed witnesses by way of motion to quash].)

Although we have found no California case expressly holding a third party intervenor has standing to make a mixed procedural/substantive attack on a subpoena duces tecum, the ability to do so seems to be implied by cases dealing with the analogous situation of suppression motions directed at the fruits of subpoenas duces tecum. (*See Carlson v. Superior Court* (1976) 58 Cal.App.3d 13, 20-23 [129 Cal.Rptr. 650] [where subpoena issued under section 1326 was procedurally defective because requested

bank records given directly to prosecutor instead of to trial court, defendants' motion to suppress those records should have been granted]; cf. *People v. Warburton* (1970) 7 Cal.App.3d 815 [822-825, 86 Cal.Rptr. 894] [defendant who was not asserting any proprietary or privilege claim as to business records subpoenaed by Commissioner of Corporations could not mount Fourth Amendment attack on procedural irregularities in subpoena procedure].)

In any event, because we will reject petitioners' claim the subpoenas were facially defective, we need not reach a definitive conclusion on the standing issue.

b. *Subpoenas not invalid for lack of affidavits.*

Petitioners contend the grand jury subpoenas served on the Los Angeles Archdiocese were invalid because they lacked the good cause affidavits required by Code of Civil Procedure sections 1985, subdivision (b) (affidavit shall be served with subpoena duces tecum, showing good cause and materiality) and 1987.5 (service of subpoena duces tecum is invalid without affidavit).[9]

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[9] Code of Civil Procedure section 1985, subdivision (b), provides: "A copy of an affidavit shall be served with a subpoena duces tecum issued before trial, showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control."

Code of Civil Procedure section 1987.5 provides, in pertinent part: "The service of a subpoena duces tecum is invalid unless at the time of such service a copy of the affidavit upon which the subpoena is based is served on the person served with the subpoena."

Petitioners argue these statutes apply to grand jury proceedings by virtue of section 1102, which provides: "The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code." Citing cases that applied this affidavit requirement to criminal trial subpoenas, and assuming that if it applies to criminal trials it must also apply to grand jury proceedings, petitioners conclude the subpoenas in this case were defective because they lacked good cause affidavits. We conclude, however, that this affidavit requirement does not apply to either criminal trials or criminal grand jury proceedings.

Pitchess v. Superior Court (1974) 11 Cal.3d 531 [113 Cal.Rptr. 897, 522 P.2d 305], expressly held, in the context of a criminal trial, that Code of Civil Procedure section 1985 was irrelevant: "Petitioner initially urges that the affidavits in support of the subpoena duces tecum are insufficient to justify discovery because they fail to demonstrate 'good cause' with adequate specificity as required by Code of Civil Procedure sections 1985 and 2036.[10] The contention is premised on the erroneous assumption that the statutory provisions governing discovery in civil actions apply to criminal proceedings." (*Pitchess v. Superior Court, supra,* at p. 535, fn. omitted.) With one exception, the cases petitioners cite that applied the affidavit

[10] When *Pitchess* was decided, Code of Civil Procedure section 1985 was substantially the same as it is now and Code of Civil Procedure section 2036, subdivision (a), provided: "'A party required to show "good cause" to obtain discovery under any provisions of Chapter 2 (commencing with Section 1985) . . . shall show specific facts justifying discovery and mere proof of the relevance of the information sought to the subject matter of the action shall not be sufficient.'" (*Pitchess v. Superior Court, supra*, 11 Cal.3d at p. 535, fn. 1.)

requirement to criminal trials all predate *Pitchess*. (*See People v. Brinson* (1961) 191 Cal.App.2d 253 [12 Cal.Rptr. 625]; *People v. Schmitt* (1957) 155 Cal.App.2d 87 [317 P.2d 673]; *People v. Clinesmith* (1959) 175 Cal.App.2d Supp. 911 [346 P.2d 923].) The exception, *People v. York* (1980) 108 Cal.App.3d 779 [166 Cal.Rptr. 717], merely assumed in dictum that it applied. (*Id.* at pp. 789-792.)

Petitioners, however, fail to cite *Fabricant v. Superior Court* (1980) 104 Cal.App.3d 905, 915 [163 Cal.Rptr. 894], wherein this court relied on *Pitchess* in the course of holding that certain Code of Civil Procedure sections permitting attorney fees in connection with a subpoena quashal did not apply to criminal cases, pointing out: "It must also be borne in mind that at the time of the enactment of Code of Civil Procedure sections 1987.1 and 1987.2, our Supreme Court had decided *Pitchess* . . . , holding civil discovery procedures inapplicable in criminal cases and specifically rejecting the affidavit requirement of . . . section 1985." (*Fabricant v. Superior Court, supra,* at p. 915.)

Equally important, we conclude no affidavit should be required because the very purpose of a grand jury investigation would be vitiated if a subpoena duces tecum had to be justified by a threshold good cause showing. "'[The grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the

beginning. [Citation.]' [Citation.]" (*United States v. Dionisio* (1973) 410 U.S. 1, 13, fn. 12 [93 S.Ct. 764, 771, 35 L.Ed.2d 67].)

In *United States v. R. Enterprises, Inc.* (1991) 498 U.S. 292 [111 S.Ct. 722, 112 L.Ed.2d 795], the Supreme Court rejected a lower court decision requiring the government to make an initial showing of relevancy, admissibility and specificity in order to enforce grand jury subpoenas for business records.

"A grand jury subpoena is . . . much different from a subpoena issued in the context of a prospective criminal trial, where a specific offense has been identified and a particular defendant charged. . . . [T]he Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause *because the very purpose of requesting the information is to ascertain whether probable cause exists.* [Citation.] This Court has emphasized on numerous occasions that many of the rules and restrictions that apply at a trial do not apply in grand jury proceedings. This is especially true of evidentiary restrictions." (*United States v. R. Enterprises, Inc., supra,* 498 U.S. at pp. 297-298 [111 S.Ct. at p. 726], italics added.) "The teaching of the Court's decisions is clear: A grand jury 'may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials,' [citation]." (*Id.* at p. 298 [111 S.Ct. at p. 726].) "[*T*]he law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority. [*Citations.*] *Consequently, a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing*

unreasonableness must be on the recipient who seeks to avoid compliance. Indeed, this result is indicated by the language of Rule 17(c),[11] which permits a subpoena to be quashed only 'on motion' and 'if *compliance* would be unreasonable' (emphasis added). *To the extent that the Court of Appeals placed an initial burden on the Government, it committed error. . . .*" (*Id.* at pp. 300-301 [111 S.Ct. at p. 728], italics added.)

We heartily concur in the logic of *United States v. R. Enterprises, Inc., supra,* 498 U.S. 292, and therefore conclude that the subpoenas duces tecum were not facially defective for lack of good cause affidavits.

3. *Untimely raised claims are without merit.*

Finally, we address two other points petitioners have raised in their response to the People's return to the writ petition. It is asserted the subpoena relating to petitioner M.B. should be quashed for the additional reason that he has now been charged by criminal complaint with 26 counts of child molesting. It is also asserted the subpoena relating to petitioner D.G. should be quashed for the additional reason that the People concede the statute of limitations has expired as to him.

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[11] Federal Rules of Criminal Procedure, rule 17(c) (18 U.S.C.), entitled "Producing Documents and Objects," provides: "(1) In General. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them. [¶] (2) *Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.*" (Italics added.)

However, given the wide breadth of legitimate grand jury investigative aims, we are not persuaded that these unelaborated assertions alone are sufficient to warrant quashing the subpoenas. A presumption of regularity is afforded to grand jury proceedings, a presumption that "attaches even after the grand jury has returned an initial indictment. After all, superseding indictments setting forth new charges or adding new defendants are familiar fare. [Citations.]" (*U.S. v. Flemmi* (1st Cir. 2001) 245 F.3d 24, 28.) The grand jury may be properly interested in other aspects of a person's conduct than those necessarily leading to criminal charges against that person.

Disposition

The petition for writ of mandate is denied; our previous stay order in this matter is vacated.

Croskey, J., and Kitching, J., concurred.

No. 05-1039

IN THE
SUPREME COURT OF THE UNITED STATES

DOES 1 AND 2,

Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California,
Second Appellate District, Division Three

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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No. 05-1039

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Real Party in Interest, the People of the State of California, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the California Court of Appeal's decision in this case.

STATEMENT OF THE CASE

For purposes of this Brief in Opposition, Real Party in Interest adopts the Procedural Background and Factual Background made in the opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three (A- 3 - A- 10), except as specifically stated below.

ARGUMENT

I. THERE IS NO COGNIZABLE FOURTH AMENDMENT ISSUE CONCERNING THE CALIFORNIA GRAND JURY SUBPOENAS

Rules of the United States Supreme Court, Rule 10 "Considerations Governing Review on Certiorari" reads in pertinent part:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> * * *
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of the United States court of appeals;
>
> (c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Does 1 and 2 state that their Fourth Amendment contentions concerning the grand jury subpoenas were answered by the court below by its citation to its previous decision in this litigation in *M.B. v. Superior Court*, 127 Cal.

Rptr. 2d 454, 103 Cal.App.4th 1384 (2002). The time to seek review of the decision in *M.B. v. Superior Court* by petition for a writ of certiorari has long since run out.

The court below appropriately relied on its previous decision in this case on the issue of the proper interpretation of California State law concerning California grand jury subpoenas. The discussion of federal law in *M.B. v. Superior Court, supra,* was not dispositive of the case. In its previous decision, the court below discussed federal precedent in the context of the common law history of grand juries. *Id.* at 457-58. The court below ruled that this history was supportive of the California common law history that the California Supreme Court held was applicable to the interpretation of California statutes governing the grand jury. *Id.* at 458-59. The court below also held that a review of the California Legislative history also upheld the power of the grand jury to issue subpoenas. *Id.* at 459-60.

In finding that a good cause affidavit was not necessary for a grand jury subpoena to issue, the court below in *M.B. v. Superior Court, supra,* properly relied on California statutes and case law for the proposition that such affidavits are not required for grand jury subpoenas. *Id.* at 462. In *M.B. v. Superior Court,* the court below "heartily concur[red] in the logic of *United States v. R. Enterprises, Inc., supra,* 498 U.S. 292 [(1991)]" (*M.B. v. Superior Court,* 127 Cal. Rptr. 2d at 462), but held based on California precedent, *Pitchess v. Superior Court,* 522 P.2d 305, 11 Cal.3d 531 (1974), that the affidavit requirement did not apply to California criminal grand jury proceedings. *M.B. v. Superior Court,* 127 Cal. Rptr. 2d at 1394.[1]

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[1] In addition, after this Court's decision in *Stogner v. California,* 539 U.S. 607, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003), which held that California's expansion of the statute of limitations for child molestation was unconstitutional, the referee quashed the original subpoenas and required that the People issue new subpoenas "on the assurance and subsequent showing the People were investigating credible, prosecutable claims against named targets." *Roman Catholic Archbishop of Los*

This Court has consistently stated:

> [T]his Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground, *see Herb v. Pitcairn*, 324 U.S. 117, 125–126, 65 S. Ct. 459, 89 L. Ed. 79 (1945), as it will if the state court's opinion "indicates clearly and expressly" that the state ground is an alternative holding, *see Michigan v. Long*, 463 U.S. 1032, 1041, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983); *see also Harris v. Reed*, 489 U.S. 255, 264, n.10, 109 S. Ct. 1038, 103 L. Ed. 2d 308, (1989); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S. Ct. 183, 80 L. Ed. 158 (1935).

Sochor v. Florida, 504 U.S. 527, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992) [holding that this Court would not address the heinousness factor of the Florida state death penalty law because the Florida Supreme Court had determined based on state law that the claim had not been preserved for appeal].

II. THERE IS NOTHING NEW OR CONTROVERSIAL IN THE ESTABLISHMENT CLAUSE DECISION IN THIS CASE

Does 1 and 2 do not discuss the establishment clause decision of the court below in their petition for writ of certiorari, but they do concur in the petition filed by the Archdiocese and they cite the establishment clause as one of the constitutional provisions involved in this case. Accordingly, the People discuss below the propriety of the establishment clause decision of the court below.

Angeles v. Superior Court, 32 Cal.Rptr.3d 209, 215, 131 Cal.App.4th 417, 426 (2005); A-4.

A conference on church autonomy was recently held at the J. Rubin Clark Law School, Brigham Young University. A lengthy article concerning sexual misconduct and ecclesiastical immunity was published as result of that conference. As succinctly stated in the Brigham Young article:

> Every American jurisdiction criminalizes, and makes tortious, sexual contact with persons below a specified age of consent. Ecclesiastical immunity has never barred criminal prosecution or civil actions for a religious leader's violation of these laws. The reasons are obvious. Few would be willing to defend such conduct by claiming that their religious commitments included sexual interaction between adults and minors, *or that a government investigation into such interaction would impermissibly entangle the state in religious matters. Were such defenses raised, courts would emphatically reject them on grounds that the public interest in protecting children vastly outweighs any claim of religious privilege, and that investigation and adjudication of the sexual abuse of children can proceed without state intrusion into questions of religious doctrine or governance.*

Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1820. [Church Autonomy Conference- February 6–7, 2004, J. Rubin Clark Law School, Brigham Young University: Church Autonomy and Religious Group Liability] (footnotes 109 and 110 omitted, emphasis added).

The court below properly applied this Court's precedent as stated in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), and as further explained by this Court in *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct.

1997, 138 L. Ed. 2d 391 (1997). *Roman Catholic Archbishop of Los Angeles v. Superior Court,* 32 Cal. Rptr. 3d 209, 221-23, 131 Cal.App.4th 417, 434-36 (2005); A-18 – A-21. In another state court case directly on point, *Society of Jesus of New England v. Commonwealth,* 808 N.E.2d 272, 441 Mass. 662 (2004) the Massachusetts Supreme Court rejected a claim that disclosure of a priest's personnel file pursuant to a grand jury subpoena in connection with a criminal prosecution for sexual assault would violate the establishment clause. There is no dispute in the law of the land concerning the appropriateness of issuing a grand jury subpoena for evidence of crimes in the possession of a religious entity. *See People v. Campobello,* 810 N.E.2d. 307, 317, 348 Ill.App.3d 619 (2004); *Commonwealth v. Stewart,* 690 A.2d 195, 201–02, 547 Pa. 277, 289-91 (1997); *In re Grand Jury Subpoena Duces Tecum Served Upon Rabbinical Seminary,* 450 F.Supp. 1078, 1082 (E.D.N.Y. 1978); *Niemann v. Cooley,* 637 N.E.2d 943, 93 Ohio App. 3d 81 (1994).

There is no conflict between federal authorities concerning the application of the establishment clause to neutral state laws seeking evidence of criminal conduct by clergymen and the decision in this case. For example, in the court below, both the Archdiocese and Does 1 and 2 attempted to rely on *Elvig v. Calvin Presbyterian Church,* 375 F.3d 951 (9th Cir. 2005), for the proposition that the ministerial exception to the establishment clause conflicts with the decision in this case. The United States Court of Appeals for the 9th Circuit sitting en banc refused to hear its decision in *Elvig* and stated:

> Our decisions in *Bollard* [*v. California Province of the Soc'y of Jesus, 196 F.3d 940* (9th. Cir. 1999)] and this case are fully consistent with the First Amendment and the "ministerial exception" to Title VII. Under *Bollard* and this case, a church may hire, fire, promote, refuse to promote, and prescribe the

> duties of its ministers, free from judicial scrutiny under Title VII. It need advance no justification, religious or otherwise, for such actions. *Bollard* and this case do, however, hold that sexual harassment by a minister is not protected by the First Amendment. A church is required to comply with Title VII when a minister is sexually harassed by another minister employed by the church, *just as a church is required to comply with state tort laws when a parishioner is sexually abused by a minister employed by the church.* In neither of these circumstances is a church protected by the First Amendment.

Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 795 (9th Cir. 2005), emphasis added.

Even the dissent in the en banc *Elvig* decision acknowledged that the church would not be exempt from state action in pursuit of crime.

> If the Archbishop of Canterbury had killed one of the king's knights or raped an alter boy, he would have faced trial under a murder or rape law of general applicability. That is not analogous to the case at bar because it has nothing to do with the church's employment decisions regarding its ministers. If the king had gotten rid of the Archbishop by instigating a nun's claim that his prayers and interpretations of religious doctrine about sin had created a hostile work environment for women, that would have been an employment discrimination claim analogous to the case at bar.

Id. at 804 n.37 (Kleinfeld, J., dissenting).

These grand jury subpoenas have nothing to do with the ministerial exception. They have everything to do with the dissent's comment that the Archbishop of Canterbury would

not be exempt from the application of laws of general applicability if he had raped an alter boy. As Justice Kozinski stated in his concurring opinion in *Elvig*, "The ministerial exception applies, if at all, based on the plaintiff's status as a minister." *Id.* at 796.

Likewise, the District Attorney's Office is interested only in documents that contain evidence of criminal sexual abuse of children. The critical question for this office is not whether the office of the Vicar for Clergy has a religious purpose, but rather whether the documents that office possesses contain evidence of crime. The criminal laws are neutral as concerns religion. Investigation of these crimes is no more invasive of a religious institution than of an educational institution or a health institution.

III. THE FREE EXERCISE ISSUE HAS BEEN DECIDED ON INDEPENDENT STATE GROUNDS

Does 1 and 2 also request that this Court abandon the neutral law of general applicability test announced in *Employment Div., Dept. of Human Res. of Or. et al. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) in favor of the compelling state interest balancing test of *Sherbert v. Verner*, 374 U.S. 398 (1963). However, both the Archdiocese and Does 1 and 2 invited this Court to decide the free exercise claim based on California Constitution Article I, section 4, which provides that "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." Based upon the California Supreme Court's decision in *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 32 Cal.4th 527 (2004), (writ of certiorari denied at 543 U.S. 816 (2004)), the court below stated "we conclude that even if the pre-*Smith* compelling

state interest test governs a California free exercise claim, that test is met here." *Roman Catholic Archbishop v. Superior Court,* 32 Cal. Rptr. 3d at 225, 131 Cal.App.4th at 438; A-28.

A state court opinion that discusses federal and state law does not confer jurisdiction on this Court when the state law analysis is independent of federal law and is adequate by itself to support the judgment. *Sochor v. Florida*, 504 U.S. at 533-34; *Michigan v. Long*, 463 U.S. at 1038, n.4; *Fox Film Corp. v. Muller*, 296 U.S. at 210.

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CONCLUSION

As this Court stated in *Branzburg v. Hayes* 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972): "Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle [is] that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common law or statutory privilege. . . ." *Id.* at 688. Where the state seeks evidence of criminal sexual child abuse by priests, the church may not interpose the First Amendment religion clauses in order to shield such evidence from review by the grand jury. *Society of Jesus of New England,* 808 N.E.2d 272, 441 Mass. 662; *People v. Campobello,* 810 N.E.2d. at 317, 348 Ill.App.3d 619. The People of the State of California respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(3)

No. 05-1039

In The
Supreme Court of the United States

DOES 1 and 2,

Petitioners,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party In Interest.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California
Second Appellate District, Division Three

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

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Petitioners reply to the Opposition of the District Attorney as follows:

First, the Opposition contains misleading language about the decision below from the beginning, where it states, "The court below appropriately relied on its previous decision *in this case* on the issue of the proper interpretation of California State law concerning California grand jury subpoenas." [Emphasis added.]

It appears that the District Attorney is trying to convey the impression that the lower court's decision in *M.B. v. Superior Court,* 103 Cal. App.4th 1384 (2002) involved the *same case* as this Petition does, and that since *M.B.* was not appealed, somehow this case cannot be appealed.

It is important to clarify the record.

This Petition does *not* involve the same case as *M.B.* This Petition involves *different subpoenas*, issued by a *different grand jury*. The subpoenas in *M.B.* were quashed on other grounds by the trial court. This Petition involves *different Petitioners*.[1]

Further, in its decision in this case, the Court of Appeal initially erroneously assumed this case was the same as *M.B.*, and issued an opinion holding that the *M.B.* constituted "the law of the case." Petitioners filed a timely Petition for Rehearing, pointing out that, although the

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[1] *M.B.* was brought by three priests, of which Doe 1 was one party. Doe 2 in this Petition was not a party in any manner to the *M.B.* litigation.

subpoenas were similar, the cases were *different* – different parties, different grand juries, different subpoenas – *and the Court of Appeal thereupon modified its ruling*, and ruled on the merits by invoking the precedent of *M.B.* The modified opinion omitted entirely reference to the "law of the case" doctrine, and instead simply applied the reasoning from *M.B.* Appendix, page 1, in the caption of the decision below reflects this modification, where it states, "As Modified on Denial of Rehearing Aug. 16, 2005."

Therefore, this case is properly before this Court.

Second, although it is true that the court below *entirely* ignored the Fourth Amendment and the cases, such as *Boyd v. United States,* 116 U.S. 616 (1886) that were cited to it by Petitioners and that were the core of Petitioners' arguments on the minimal Constitutional requirements for grand jury subpoenas, it does not follow that the Fourth Amendment does not apply in California. The landmark decision of *Mapp v. Ohio*, 367 U.S. 643 (1961) held "the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth." (At 655.) Since then it has been beyond dispute that states cannot drop below the protections granted by the Fourth Amendment against unreasonable searches and seizures.

It is incumbent on this Court to restore the protection of the Fourth Amendment for citizens of California as it applies to criminal and grand jury subpoenas. As of now, because of the convoluted and erroneous logic of the decision below and its ancestor, *M.B. v. Superior Court, supra,* grand juries, prosecutors, and criminal defendants all can compel Californians to produce in court their private papers with absolutely no showing of cause. In the

case of grand juries, there is not even a statute that provides for them to issue subpoenas duces tecum – a blatant deviation from the rule of *Boyd v. United States, supra.* Said that Court, quoting Lord Camden in *Entick v. Carrington,* 19 Howell's State Trials 1029 (1765), "If it [search and seizure authority] is the law, it will be found in our books; if it is not found there, it is not the law."

Third, the District Attorney, in trying to persuade this Court that "independent state grounds" exist to ignore the Fourth Amendment, continues the lower court's misconstruction of the holding of one state court opinion, *Pitchess v. Superior Court*, 11 Cal.3rd 531 (1974), contending that it stands for the proposition that "the affidavit requirement did not apply to California grand jury proceedings." As Petitioners pointed out in the Petition, at page 5, *Pitchess* expressly held the opposite: that the affidavits submitted for the criminal subpoena duces tecum in that case were *sufficient.*

The pertinent holding of the California Supreme Court in *Pitchess* is:

> "Were a court to require strict adherence to the provisions of Code of Civil Procedure sections 1985 (the subpoena duces tecum affidavit requirement) and 2036, subdivision (a), (a separate requirement for a showing of good cause and materiality in civil requests for production of documents), it is likely that Fifth Amendment problems would develop in many instances. Therefore, in contrast to the formal requirements for civil discovery, an accused in a criminal prosecution may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial. The requisite showing may be satisfied by

> general allegations which establish some cause for discovery other than 'a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime.'" (Citations omitted.)
>
> "In the case at bar, *the affidavits filed by defendant are clearly sufficient to justify discovery under the foregoing standard.*" (At 536-537, emphasis added.)

In any event, Petitioners submit that no "independent state grounds" can eliminate the application of the Fourth Amendment to criminal and grand jury subpoenas. "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn,* 34 U.S. 117, at 125-126 (1945). In this case, *no* California statute grants power to grand juries to issue the subpoenas involved in this case, and without a very clear legislative grant of such power, the Fourth Amendment says it cannot exist.

Further, if California grand juries can somehow, consistent with the Fourth Amendment, avail themselves of the separate provisions for criminal trial subpoenas, such subpoenas would have to be accompanied by the affidavits of good cause and materiality provided by statute that all California cases required prior to the aberrant decision of *M.B. v. Superior Court, supra,* as detailed in the Petition herein at pages 14-15, since that is the only subpoena duces tecum process provided by the California legislature that comports with the established standards of the Fourth Amendment. Petitioners submit that, in his zeal to pursue these subpoenas, the District Attorney has overlooked the wider consequences of a rule

that no showing of cause whatever is required for criminal subpoenas duces tecum in California. Petitioners further submit that rule cannot possibly be reconciled with the protection of the Fourth Amendment.

Fourth, the District Attorney's contention in his Opposition overstates the notion that the court below resolved all of the Fourth Amendment issues on "independent state grounds." On the claim that the subpoenas are so overbroad – especially in light of the sensitive invasion into religious relationships at the core of the institution of the Roman Catholic Church – that they constitute "fishing expeditions" in violation of the Fourth Amendment, the court below struggled with and purported to construe the Fourth Amendment itself. (Appendix pages 59-61.)

Fifth, the District Attorney apparently misconstrues Petitioners' arguments based on the effect of these subpoenas on religious rights protected by the First Amendment. Petitioners have never argued that religious freedom permits priests to be free from prosecution for any crime. The essence of their first religious argument is that when the process of investigating the crime excessively chills freedom to practice religion, then that process may be prohibited. In this case, the subpoenas seek to invade previously sacrosanct communications within the Roman Catholic Church between a troubled priest and his bishop (together with the bishop's essential staff). Petitioners contend that such communications are *essential* to the bishop-priest relationship and the Catholic concept that priests represent Christ on Earth. If such broad subpoenas can be used to compel disclosure of these essential religious communications, it will – and according to the Petition filed by the Archdiocese, it already has – chill the

necessary open discussions between a priest and his bishop on matters exactly like those presented in this Petition. A bishop cannot be forced to wear a sheriff's badge and still be able to maintain his religious relationship with his priests.

Sixth, although the District Attorney contends Petitioners argued and the court below properly decided Petitioners' religious claims on "independent state grounds," that is not the case. Petitioners joined below in the Archdiocese's First Amendment arguments, but they also presented their own religious arguments, combined with Fourth Amendment arguments, based on federal law. In any event, the "independent state grounds" doctrine does not permit a state to apply a lower standard of protection to rights established by the United States Constitution. In this case, Petitioners have properly contended that the combination of rights based on the Free Exercise Clause of the First Amendment and the Right to Privacy, found in the Fourth Amendment and as it relates to sexual activity, provides the Constitutional critical mass to review *Employment Division v. Oregon,* 494 U.S. 872 (1990). The court below may have tried to avoid Supreme Court review by relying only on California precedent, but as we have shown above, that is insufficient where the court below "incorrectly adjudge[d] federal rights." *Herb v. Pitcairn, supra.*

In conclusion, Petitioners submit that the District Attorney's Opposition has done nothing to diminish the validity of Petitioners' arguments and the great importance of bringing California criminal and grand jury subpoena practice into compliance with the protections of the Fourth Amendment. For all the foregoing reasons, the

District Attorney's Opposition should be rejected and the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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